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I. INTRODUCTION

In February 2007, the world had a ringside seat to a truly macabre fight. Under the glare of television cameras, Anna Nicole Smith's nearest but not dearest[1] battled in a Florida probate court over custody of her body.[2] The parties agreed on only one point: "Anna Nicole Smith's appearance was a paramount issue to her."[3] Yet, those same parties denied Anna Nicole after death the beauty she prized during life. Because of their protracted legal wrangling, Anna Nicole went to her grave a decomposed corpse in a closed casket.[4]

Anna Nicole Smith's tragic fate is by no means unique. For nearly three months, the body of the self-styled "Godfather of Soul,"[5] James Brown, lay refrigerated in a secret location while his children, disputed wife,[6] and executors fought over his final resting place.[7]

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1. Anna Nicole Smith's "nearest and dearest" was her son, Daniel, who died tragically on September 10, 2006 at the age of twenty. *See* Michelle Caruso, *Anna Nicole Smith Mourns Loss of Son*, N.Y. DAILY NEWS, Sept. 11, 2006 (reporting Daniel's death). She reportedly "never recovered from her son's death" and even tattooed a picture of Daniel on her left shoulder to "keep Daniel with her forever." Alex Tresniowski et al., *What Did Anna Want?*, PEOPLE, Mar. 5, 2007, at 67. The participants in the battle over Anna Nicole's remains were her lawyer/companion/agent/reality TV-show co-star, Howard K. Stern; her estranged mother, Virgie Arthur; her former lover, Larry Birkhead; and her infant daughter's court-appointed guardian, Richard Milstein. *See generally* James T.R. Jones, *Anna Nicole Smith and the Right to Control Disposition of the Dead*, LOUISVILLE BAR BRIEFS, May 2007, at 24, *available at* http://ssrn.com/abstract=996496 (analyzing the legal issues surrounding the disposition of the body in the Anna Nicole Smith case).

2. *See, e.g.*, *Who Should Bury Anna Nicole?: Battle in Florida Courtroom* (ABC television broadcast Feb. 21, 2007) (live broadcast of the Anna Nicole Smith probate proceedings).

3. *In re* Marshall, No. 07-00824 (61), slip op. at 5 (Fla. Cir. Ct. Prob. Div. Feb. 22, 2007), *available at* http://i.a.cnn.net/cnn/2007/images/02/22/finalorder07824.pdf [hereinafter *In re* Marshall].

4. The medical examiner, Dr. Joshua Perper, said after the appeals court ruling that "he was not sure if Smith's body would be suitable for a viewing. He had told [Judge] Seidlin during the hearing that she was decomposing, even though she had already been embalmed." *Last Respects Paid to Anna Nicole Smith at Bahamas Funeral, Burial Services*, Mar. 4, 2007, http://www.foxnews.com. Despite mortuary workers' use of "special embalming cream that smoothes decayed flesh," Jennifer Fermino, Patrick Gallahue & David K. Lee, *Anna Will Be Drop-Dead Gorgeous–Dolled Up in Tiara, Luxe Gown for Burial*, N.Y. POST, Mar. 2, 2007, at 3, she was ultimately buried in a closed casket. *Last Respects*, *supra*.

5. *See, e.g.*, Last Will and Testament of James Brown (Aug. 1, 2000) ("I, James Brown, also known as 'The Godfather of Soul', . . . do hereby make, publish and declare this to be my Last Will and Testament . . . .").

6. Tomi Rae Hynie may not in fact be James Brown's legal widow because she was married to another man, Javed Ahmed, at the time she married James Brown. *See* Mike Wynn & Johnny Edwards, *Brown Will Predates Marriage*, AUGUSTA CHRON., Jan. 16, 2007, at B1. Her first marriage was not annulled until nearly three years after she married Brown. *Id.*

7. *See* Virginia Anderson, *Brown's Body to Be Placed in Crypt Today*, COX NEWS SERVICE, Mar. 9, 2007 (noting that Brown's body had "been kept in a refrigerated room . . . at an undisclosed location" after his children moved it from his estate while feuding with Brown's

Evangelist Billy Graham and his wife, Ruth, had an even more unfortunate experience. Unlike Anna Nicole Smith and James Brown, the Grahams were still alive when their children engaged in "a struggle worthy of the Old Testament"[8] over where to bury the elderly couple.[9]

Red Sox legend Ted Williams suffered the ultimate indignity. After a family feud over his body,[10] the once "Splendid Splinter" became a frozen, cracked head in an Arizona cryonics laboratory.[11] With a greasy scrap of paper[12] and a blind faith in the "miracles" of

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personal representatives); *Deal Reached On James Brown's Burial Place*, AP, Feb. 20, 2007 (on file with the Vanderbilt Law Review).

8. Laura Sessions Stepp, *A Family at Cross-Purposes; Billy Graham's Sons Argue Over a Final Resting Place*, WASH. POST, Dec. 13, 2006, at A1.

9. Franklin Graham "wanted the couple to be buried at the site of the Billy Graham Library, which [was] to open next year in Charlotte, N.C." while Ned Graham "supported the longtime wishes of his mother, Ruth Graham, 86, to be buried at The Cove . . . in Asheville, N.C." Adelle M. Banks, *Graham Says Burial Place Still Undecided*, RELIGION NEWS SERVICE, Dec. 19, 2006. On December 18, 2006, Billy Graham announced that he and his wife were "still considering the appropriate physical burial spot." *Id.* He issued a statement, which read in part: "As for our final resting place, we are prayerfully pursuing that very personal decision regarding the exact location. . . . That determination will not be made by our family, our organization or outsiders, but will be ours alone." *Id.* On June 13, 2007, the day before his wife's death, Billy Graham revealed that during the spring the couple "made the decision to be buried beside each other at the Billy Graham Library . . . ." Adelle M. Banks, *Ruth Graham in Coma as Family Reveals Burial Plans*, RELIGION NEWS SERVICE, June 13, 2007. On June 17, 2007, "Ruth Bell Graham was buried at the foot of a cross-shaped walkway in the Prayer Garden" at the Billy Graham Library. *Scripture, Lilies Adorn Private Burial Service*, VIRGINIAN-PILOT (Norfolk, VA), June 18, 2007, at B4.

10. The battle over disposition of Ted Williams's remains began on July 5, 2002, four days after Williams's death. Thomas C. Tobin et al., *A Tug of War Over Ted*, ST. PETERSBURG TIMES, July 9, 2002, at 1A. Williams's daughter, Barbara Joyce Williams Ferrell, claimed that her father wished to be cremated but her half-siblings, John Henry Williams and Claudia Williams, claimed that Williams wanted to be cryogenically frozen. *Id.* The parties reached a private settlement agreement on December 20, 2002 and Ferrell ended her efforts to have her father's body cremated. Raja Mishra, *Williams Children Settle Dispute; Slugger's Body to Remain Frozen in Cryonics Tank*, BOSTON GLOBE, Dec. 21, 2002, at B1. For an analysis of the decedent's right to direct disposition of the body and the Ted Williams case, see generally Alexander A. Bove, Jr. & Melissa Langa, *Ted Williams: Is He Headed for the Dugout or the Deep Freeze? Property Rights in a Dead Body Resurrected*, MASS. LAW. WKLY., Aug. 19, 2002.

11. *See* Tom Verducci, *What Really Happened to Ted Williams: A Year After the Jarring News that the Splendid Splinter Was Being Frozen in a Cryonics Lab, New Details, Including a Decapitation, Suggest that One of America's Greatest Heroes May Never Rest in Peace*, SPORTS ILLUSTRATED, Aug. 18, 2003, at 66.

12. Ted Williams's Will directed that his "remains be cremated and [his] ashes sprinkled at sea off the coast of Florida where the water is very deep." Last Will and Testament of Theodore S. Williams (Dec. 20, 1996) (on file with the Vanderbilt Law Review). These instructions were "overridden by a greasy scrap of paper produced by John Henry Williams 10 days after his father's death. The crude, handwritten note, purportedly stored in the trunk of the car, describes a vague commitment to 'bio-stasis,' and carries the signature of the Splendid Splinter and two of his children." Tim Sullivan, *Williams Deserves a Hero's Farewell*, COPLEY NEWS SERVICE, Aug. 22, 2003. The note read: "JHW, Claudia, and Dad all agree to be put in Bio-Stasis after we die.

modern medicine,[13] John Henry Williams consigned his father to the ranks of the living dead. Today, a great American hero is literally and figuratively suspended[14] between life and death and "may never rest in peace."[15]

Disputes among a decedent's survivors are all too familiar to trusts and estates scholars and practitioners. Case reporters, textbooks, journals, tabloids, and websites regularly feature contentious and often bitter litigation over decedents' estates.[16] These disputes have exposed a major challenge facing inheritance law today: adapting to the changing American "family." As a vast scholarly literature has documented,[17] inheritance law continues to privilege

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This is what we want, To be able to be Together in The future, even if it is [only a] chance." Williams Note (Nov. 2, 2000) (on file with the Vanderbilt Law Review).

13. *See* Jules Crittenden et al., *No Show; Williams' Son Ducks All-Star Appearance*, BOSTON HERALD, July 10, 2002, at 1 (stating that "John Henry Williams deeply believes in the potential of cryonics to someday offer his father a new chance at life"). Proponents claim that "[c]ryonics . . . [will] ultimately brin[g] back the deceased not as elderly patients at their clinical point of death but rather in a 'rejuvenated' state." Kevin Paul Dupont, *The Idea is Revival of the Fittest*, BOSTON GLOBE, May 30, 2007, at C6 (citing Ben Best, President of the Michigan-based Cryonics Institute). If this prediction proves correct, "an awakened [Ted] Williams would not reappear as he did in the days prior to his death, but instead as the vital twenty- or thirty-something he was during the prime of his life as a Red Sox star." *Id.* Opponents, however, contend that " '[t]here is no scientific evidence that patients will ever stand a chance of being brought back . . .' liken[ing] the technology needed to reanimate a cryonics patient to the process of trying to turn a hamburger back into a cow." Jane Fryer, *The Human Deep Freeze*, DAILY MAIL (London), July 29, 2006, at 20 (quoting Dr. Arthur Rowe).

14. *Cleavage-bearing Clinton Depicted in 'Presidential Bust,'* CBC NEWS, Aug. 10, 2006, http://www.cbc.ca/arts/story/2006/08/10/clinton-sculpture-bust.html (reporting that Ted Williams's body "was placed in cryonic suspension in hopes that medical science could possibly revive him in the future").

15. Verducci, *supra* note 11, at 66. It should be noted that survivors' disputes may continue even after burial of their loved ones. *See, e.g.*, Cottingham v. McKee, 821 So. 2d 169 (Ala. 2001) (involving a dispute between the decedent's next of kin and personal representative over exhumation and cremation of the decedent's body); Kathryn Shattuck, *Rothko Kin Sue to Transfer His Remains*, N.Y. TIMES, Apr. 8, 2008, at E1 (discussing a petition by artist Mark Rothko's children to disinter their father's body and rebury it in a Jewish cemetery thirty-eight years after their father's death).

16. For instance, leading trusts and estates casebooks have reproduced *In re* Estate of Kuralt, 15 P.3d 931 (Mont. 2000), a dispute between the wife and the longtime lover of CBS newsman Charles Kuralt over property in Montana. *See, e.g.*, FAMILY PROPERTY LAW 4–39 (Lawrence W. Waggoner et al. eds., 4th ed. 2006); WILLS, TRUSTS, AND ESTATES 245 (Jesse Dukeminier et al. eds., 7th ed. 2005). A wide variety of sources discussed claims to Marlon Brando's estate. *See, e.g.*, Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 714–15 (2006); Steve Gorman, *Faces From Brando's Past Clamor for Piece of Estate*, HOUS. CHRON., Sept. 26, 2004, at A2; *Lawsuit Filed Over Brando Estate*, CBS NEWS, July 4, 2006, *available at* http://www.cbsnews.com/stories/2006/07/04/entertainment/main1774399.shtml. For an example of tabloid coverage of a family feud over an estate, see Bob Burns, *Found! James Brown's Secret Daughter*, GLOBE, July 2, 2007, at 16.

17. *See infra* Part II.A.

membership in a "traditional" family that "fewer and fewer Americans experience as reality."[18]

In earlier work, I identified the human costs of an inheritance system that prizes family status above need, merit, and support.[19] I looked abroad to foreign models, especially China's distinctive approach to inheritance, as inspiration for reform of American inheritance law.[20] Based on my comparative study, I concluded that reformers should look beyond what I called the "family paradigm of inheritance law"[21] to consider more flexible schemes that would base inheritance rights on survivors' actual relationships with decedents rather than formal familial ties.[22]

This Article finds inspiration closer to home in an area surprisingly neglected in the trusts and estates literature: resolution of survivors' conflicts over the disposition of a decedent's remains.[23] This Article is not the first to do so. In her 1999 article, *The Property of Death*, Tanya Hernández demonstrated that an outdated definition of family pervades approaches to disposition of decedents' bodies as

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18. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 271 (2001).

19. *Id.* at 240–51.

20. Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199 (1999); Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77 (1998).

21. Foster, *supra* note 18, at 199.

22. *Id.* at 240–43, 245–47, 250–51, 268–71; Foster, *Linking Support and Inheritance*, *supra* note 20, at 1256–58; Foster, *Towards a Behavior-Based Model*, *supra* note 20, at 124–26.

23. As Remigius N. Nwabueze has noted:

> [The] concept of burial rights or rights of sepulcher [has at its "core"] five categories . . . (1) the next of kin's right to possession of a decedent's corpse for the purpose of burial; (2) the right to receive the decedent's body in the condition it was when life left it; (3) the right to determine the time, place and manner of burial; and (4) the right to be notified of the decedent's death before its burial or cremation; and (5) rights relating to the disturbance of the grave (or right of repose).

Remigius N. Nwabueze, *The Concept of Sepulchral Rights in Canada and the U.S. in the Age of Genomics: Hints From Iceland*, 31 RUTGERS COMPUTER & TECH. L.J. 217, 219, 241 (2005). This Article focuses only on the first category–the right to possession of a decedent's remains. The related issue of disposition of a decedent's organs is also outside the scope of this Article. For a sampling of the extensive literature on this topic, see generally Lori B. Andrews, *My Body, My Property*, 16 HASTINGS CENTER REP. 28 (1986); Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL'Y & L. 57 (1989); Sheldon Kurtz & Michael J. Saks, *The Transplant Paradox: Overwhelming Public Support for Organ Donation vs. Under-Supply of Organs: The Iowa Organ Procurement Study*, 21 J. CORP. L. 767 (1996); Symposium, *Organ Donation*, 20 J. CORP. L. 1 (1994). For a comprehensive discussion of legal rules affecting the dead, see Kirsten Rabe Smolensky, *Rights of the Dead* (Ariz. Legal Studies Discussion Paper No. 06-27, 2006), *available at* http://ssrn.com/abstract=924499.

well as assets.[24] She found a possible model for inheritance reform in mortal remains legislation.[25] This Article also identifies a potential model for reform but in a different place—judicial practice rather than legislation. Close analysis of published opinions regarding disputes over dead bodies reveals a striking pattern. In more than one hundred of such opinions since the late nineteenth century, courts have deviated from the formal status-based rules governing disposition of remains. They have instead employed the very approach inheritance reformers have rejected—an equitable, individualized scheme that transcends the family paradigm. Regular use of this equitable, individualized scheme would allow the courts to exercise "benevolent discretion"[26] to recognize the particular decedent's intent and actual relationships with her survivors. In light of its success in the mortal remains context, this approach could be the solution for which inheritance law reformers are searching.

Part II demonstrates that the family paradigm distorts dispositions of decedents' assets and remains. Part III presents a critical analysis of recent reform strategies to address that paradigm. It argues that those strategies offer only limited responses because they remain grounded in the family paradigm. Part IV looks to the past for answers for the future. It shows that rather than basing their decisions on survivors' family status alone, American courts have a long tradition of individualized justice in resolving disputes over dead bodies. Part V concludes that reformers—including legal scholars, legislators, judges, practitioners, activists, and interest groups—should draw on this historical precedent to develop more flexible, individualized, and family-neutral schemes for dispositions of decedents' assets and remains.

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24. Tanya K. Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971, 971–75, 983–89 (1999).

25. *Id.* at 975 (arguing that "mortal remains legislation is a mechanism for modernizing" trusts and estates law).

26. *See* De Festetics v. De Festetics, 81 A. 741, 742 (N.J. Ch. 1911); Yome v. Gorman, 242 N.Y. 395, 402 (N.Y. 1926).

II. THE CHALLENGE OF ADAPTING TO THE CHANGING AMERICAN "FAMILY"

A. The Outdated Family Paradigm of Inheritance Law

Inheritance law is entrenched in a family paradigm.[27] Rules governing disposition of a decedent's estate—be it disposition by intestacy, will, contract to devise, or will substitute[28]—give preference to the so-called "natural objects of the decedent's bounty,"[29] the decedent's closest family members by blood, adoption, or marriage. Trusts and estates scholars have challenged this rigid status-based scheme as out of step with modern American society. They have presented a compelling case that inheritance law "must adapt to recognize the changing nature of the American family."[30]

In an extensive and ever-growing literature,[31] trusts and estates scholars have demonstrated that inheritance law's narrow definition of "natural objects" is both outdated and underinclusive. They have argued that the conventional definition of family as "a legally married husband and wife and the children of that marriage"[32] fails to recognize the full range of today's families. Mary Louise Fellows,[33] Thomas Gallanis,[34] and Gary Spitko,[35] for example, have

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27. Foster, *supra* note 18.

28. *See id.* at 205–21 (discussing the preference for close family members in intestacy, wills, contracts to devise, and will substitutes).

29. *See* Mundy v. Simmons, 424 A.2d 135, 139 (Me. 1980) (defining "the surviving spouse and those who stand in closest relationship within the bloodline as the natural objects of the decedent's bounty").

30. E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1094 (1999). For an outstanding, comprehensive analysis of the failure of inheritance law to "reflect modern family life," see generally RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY (2004).

31. For a review of the literature, see Foster, *supra* note 18, at 228–33.

32. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 28 (2000).

33. *See, e.g.*, Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 15–17, 65–72 (1998) (arguing that inheritance rules fail to recognize committed relationships and family units headed by committed partners).

34. *See, e.g.*, T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513, 1522–24 (1999) (calling for reform of intestacy and other default rules to "replicate the likely intent of members of the GLB [Gay, Lesbian, and Bisexual] community," including recognition of same-sex partners as heirs); T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55 (2004) (proposing inheritance law reforms to recognize domestic partners).

35. *See, e.g.*, E. Gary Spitko, *An Accrual/Multi-factor Approach to Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 256 (2002) (arguing that "[c]urrent intestacy law generally does not reflect as well as it could the way Americans today structure their family

shown that the narrow definition of "spouse" excludes domestic partners and other survivors of nonmarital committed relationships.[36] Ralph Brashier has emphasized that another "increasingly notable shortcoming[] of modern probate law is its failure to provide adequate guidelines governing the inheritance rights of children outside the traditional nuclear family."[37] In response, numerous authors propose expanding the definition of "child" to encompass children customarily barred from inheritance, such as children of unmarried cohabitants,[38] nonmarital children,[39] equitably adopted children,[40] children produced by reproductive technology,[41] and nonrelated individuals in a child-parent relationship with the decedent.[42] Other critics have called

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lives"); Spitko, *The Expressive Function of Succession Law*, *supra* note 30, at 1064–65 (discussing inheritance law's discrimination against gay men and lesbians and their relationships).

36. *See* generally Melissa Aubin, Comment, *Defying Classification: Intestacy Issues for Transsexual Surviving Spouses*, 82 OR. L. REV. 1155 (2003) (discussing inheritance issues confronting transsexual spouses).

37. Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 94.

38. *See, e.g.*, Fellows et al., *supra* note 33, at 65–72; Carissa R. Trast, Note, *You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples Are Entitled to Inheritance Rights from both Their Parents*, 35 HOFSTRA L. REV. 857 (2006).

39. *See, e.g.*, Karen A. Hauser, *Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add up to the Need for Change*, 65 U. CIN. L. REV. 891 (1997); Linda Kelly Hill, *Equal Protection Misapplied: The Politics of Gender and Legitimacy and the Denial of Inheritance*, 13 WM. & MARY J. WOMEN & L. 129 (2006); Browne Lewis, *Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children*, 39 U. TOL. L. REV. 1 (2007); Patricia G. Roberts, *Adopted and Nonmarital Children–Exploring the 1990 Uniform Probate Code's Intestacy and Class Gift Provisions*, 32 REAL PROP. PROB. & TR. J. 539 (1998).

40. *See, e.g.*, Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223 (2008); Rebecca C. Bell, Comment, *Virtual Adoption: The Difficulty of Creating an Exception to the Statutory Scheme*, 29 STETSON L. REV. 415 (1999); James R. Robinson, Comment, *Untangling the "Loose Threads": Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements*, 48 EMORY L.J. 943 (1999).

41. *See, e.g.*, Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967 (1996); Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193 (1997); Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091 (1997).

42. *See, e.g.*, Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 648 (2002) (arguing that "intestacy's definition of the parent-child relationship . . . based solely on biology or adoption [is] inadequate for many families"). According to Professor Gary:

> Many parents cannot adopt the children they raise, either because a biological parent will not relinquish parental rights or because the jurisdiction does not permit adoption by unmarried persons, gay men, or lesbians. Other parents may not adopt due to financial constraints or failure to see a need to formalize a relationship that functions well on its own. For any of these parents and children, the existing intestacy statutes may not

attention to inheritance law's exclusion of a decedent's extended[43] and blended[44] family members. A few scholars go still further. John Gaubatz,[45] Laura Rosenbury,[46] and I,[47] for example, have demonstrated that by privileging the traditional family, inheritance law ignores the claims of survivors the decedent may have valued most: her close friends, caregivers, and other nonrelatives with whom she shared an "affection-support"[48] relationship.

Trusts and estates scholars have identified another challenge to inheritance law's family paradigm: the escalation of violence, abuse, and neglect within today's American families.[49] For these scholars, the conventional definition of family is overinclusive rather than underinclusive. As Susan Gary has aptly remarked, "legal ties do not necessarily create familial ties."[50]

Critics have called for a redefinition of family to exclude even members of the "traditional" family for mistreatment of the

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carry out the decedent's intent and certainly do not support the family relationships created by the decedent.

Id. at 680.

43. *See, e.g.*, Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1 (2006) (calling attention to the difficulties individuals can face in inheriting from the grandparents who raised them).

44. *See, e.g.*, Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 918 (1989) (arguing that intestate succession law "ignores stepfamilies"); Peter T. Wendel, *The Non-Stepparent Adoption Scenario and Inheritance Rights: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351 (2005) (arguing that inheritance laws that exclude children adopted by a "step-partner" unfairly discriminate against children adopted outside of the marital context).

45. John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 559 (1977) (arguing that inheritance law should recognize that a "decedent's close family might include nonblood relatives and friends").

46. Laura Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 204–05 (2007) ("Even if friends are performing many, or all, of the functions traditionally ascribed to spouses, parents, or children, friends are not eligible . . . to inherit each other's estates under state intestacy rules."); *id.* at 205 n.69 ("[T]he bias against friendship is so established that no competent lawyer would draft a trust leaving property to a settlor's 'friends.' . . . However, competent lawyers still regularly draft trusts that leave property to a settlor's 'family' or 'relatives.' ").

47. Foster, *supra* note 18, at 245 ("The family paradigm . . . declares 'unnatural' the very relationships that many people . . . often experience as 'natural'–caring relationships with extended family members, nonmarital partners, close friends, and nonrelated caregivers."). *See also* Foster, *Linking Support and Inheritance*, *supra* note 20, at 1239–40 (arguing that status-based rules exclude caregivers).

48. Cristy G. Lomenzo, Note, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses*, 46 HASTINGS L.J. 941, 960 (1995).

49. *See* Foster, *Towards a Behavior-Based Model*, *supra* note 20, at 79–80 & nn.5–6 (discussing the "escalating violence and neglect within today's family"). For grim statistics on family violence, see Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform*, 13 LAW & INEQ. 401, 403–06 (1995).

50. Gary, *supra* note 32, at 41.

decedent.[51] They have shown that by focusing on survivors' family status alone, current rules assume that the decedent's "closest" relatives are entitled to inherit and ignore those individuals' actual behavior toward the decedent, no matter how reprehensible. The result is an inheritance system that effectively allows wrongdoers to inherit from their victims.[52] Indeed, critics of the status-based model of inheritance[53] have presented overwhelming evidence that close relatives can abuse, abandon, and fail to support a decedent yet still inherit from that decedent. Paula Monopoli, for instance, has demonstrated that status-based rules permit "deadbeat dads" to inherit from the children they neglected.[54] Similarly, Kymberleigh Korpus has cited horrific cases in which children physically, emotionally, and financially abused their elderly parents and still retained inheritance rights as the "natural objects" of the parents they mistreated.[55]

Many authors have emphasized the challenge for inheritance law of addressing misconduct within the family.[56] A few legal scholars have focused as well on a more positive societal development: supportive relationships both within and outside the traditional nuclear family.[57] These critics of the status-based definition of family have called for a comprehensive "behavior-based model of inheritance"[58] that would factor in "good" as well as "bad" behavior

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51. Foster, *supra* note 18, at 230–31.

52. Foster, *Towards a Behavior-Based Model*, *supra* note 20, at 80.

53. *See, e.g.*, Paula A. Monopoli, *"Deadbeat Dads": Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 297 (1994) (advocating following a "behavior-based model" rather than a "status-based model").

54. *Id.* at 259–60. For other discussions of inheritance by parents who abandoned or failed to support their children, see Anne-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go*, 27 IND. L. REV. 517 (1994); Alison M. Stemler, Note, *Parents Who Abandon or Fail to Support Their Children and Apportionment of Wrongful Death Damages*, 27 J. FAM. L. 871 (1988–89).

55. Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse But Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537 (2001). For a discussion of family violence, see Preble, *supra* note 49.

56. *See, e.g.*, Foster, *Towards a Behavior-Based Model*, *supra* note 20, at 80–81 (discussing reforms to disqualify heirs for misconduct toward the decedent); Foster, *supra* note 18, at 230–32 (same); Anne-Marie Rhodes, *Consequences of Heirs' Misconduct: Moving From Rules to Discretion*, 33 OHIO N.U. L. REV. 975 (2007) (exploring various obstacles the law faces in addressing heirs' misconduct).

57. For extended discussions of support and inheritance, see Foster, *Linking Support and Inheritance*, *supra* note 20; Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=1112522.

58. Monopoli, *supra* note 53, at 297 (proposing "a behavior-based model of inheritance by fathers from their deceased children" that permits courts to "deviat[e] from a status-based model"); Korpus, *supra* note 55, at 573 (advocating behavior-based statutes to "extinguish inheritance rights" of heirs who abused elderly relatives). In earlier work, I called for an

toward the decedent.[59] Such a focus would encourage and reward care and support to those in need and allocate decedents' assets more equitably.

As the next Section will show, the family paradigm—with all its flaws—applies to the disposition of a decedent's remains as well as her assets.

B. Extension to Disposition of Remains

In *The Property of Death*,[60] Tanya Hernández demonstrated that the family paradigm extends beyond the inheritance context. She showed that the paradigm also defines and constrains survivors' rights to a loved one's remains.[61] Professor Hernández exposed an outdated, systemic "bias"[62] in the formal rules in favor of traditional, or as she terms them, "biological,"[63] family members. She showed that those rules require courts, legislatures, and funeral homes to treat a decedent's closest relatives by blood, adoption, or marriage as the "natural" recipients of a decedent's body as well as bounty.[64] In theory,

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extension of the behavior-based model "to use inheritance for 'encouraging and rewarding' exemplary conduct within the family and society" as well as for punishing "bad" behavior. Foster, *Towards a Behavior-Based Model*, *supra* note 20, at 81.

59. *See, e.g.*, Foster, *Towards a Behavior-Based Model*, *supra* note 20, at 81 (emphasizing "good" as well as "bad" behavior); Gaubatz, *supra* note 45, at 511–12, 562–63 (emphasizing the need to "provid[e] for the meritorious"); Rhodes, *supra* note 54 (discussing approaches for rewarding a decedent's "caring parent" as well as penalizing a decedent's "abandoning parent"); Trent J. Thornley, Note, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 IND. L.J. 513, 540–49 (1996) (proposing a "care sensitive" standard to benefit a claimant who was in a "caring relationship" with the decedent).

60. Hernández, *supra* note 24.

61. *Id.* at 971–75, 983–89.

62. *Id.* at 975.

63. *Id.* at 974 n.17 ("I purposely refrain from using the alternative term 'traditional family' in order to avoid engaging in the fiction that families of choice are a recent novelty."). Professor Hernández defines "biological family . . . [to] encompass those persons who are not genetically related to a decedent yet are viewed as family by probate codes, such as spouses and adopted children." *Id.*

64. *See id.* at 972–75, 982–84, 988–89, 992–94 (citing cases and statutes that exhibit a "familial approach" to disposition of remains). "Under both common law and statutes, spouses have first priority in determining what will happen with the body of a deceased spouse in the absence of other directions by the decedent. If there is no spouse, or if the couple has separated by divorce decree, then both statutes and common law grant priority of decision-making in the descending order of the consanguinity of the deceased." Jennifer E. Horan, Note, *"When Sleep at Last Has Come": Controlling the Disposition of Dead Bodies for Same-Sex Couples*, 2 J. GENDER RACE & JUST. 423, 424 (1999). *See also* Tracie M. Kester, Note, *Can the Dead Hand Control the Dead Body? The Case for a Uniform Bodily Remains Law*, 29 W. NEW ENG. L. REV. 571, 573–77 (2007) (summarizing case law and statutes giving the decedent's spouse and next of kin the right to possess and bury the decedent's body). For extended discussion of the issues funeral homes confront in disputes between traditional and nontraditional family members, see generally Mark

a decedent's instructions regarding disposition of her body are supposed to trump family survivors' preferences.[65] Yet, Professor Hernández documented that the familial bias is so strong that in practice, funeral homes and probate courts may disregard even a decedent's express written "directions for the disposal of mortal remains to gratify the contrary burial wishes of next of kin."[66] Recent cases confirm that the family paradigm remains influential today.

Consider, for example, the Anna Nicole Smith case. Judge Larry Seidlin used the conventional definition of "natural objects"—the decedent's intestate heirs[67]—to determine who was the closest family member entitled to Anna Nicole's remains.[68] Under Florida intestacy law, Anna Nicole's infant daughter, Dannielynn, was her "only child, heir, and next of kin."[69] Accordingly, Judge Seidlin ruled that neither Anna Nicole's unmarried cohabitant, Howard Stern, nor her mother, Virgie Arthur, had any legal rights to her remains.[70] He awarded custody of the body to a court-appointed guardian ad litem for Dannielynn.[71]

E. Wojcik, *AIDS and Funeral Homes: Common Legal Issues Facing Funeral Directors*, 27 J. MARSHALL L. REV. 411 (1994).

65. *See* Hernández, *supra* note 24, at 982 (citing cases and statutes that "respect a decedent's right to assert burial preferences and to otherwise dispose of his or her own body by will as part of the freedom of testation").

66. *Id.* at 983 (describing the practice of some probate courts to minimize the testamentary freedom of the decedent). *See id.* at 973 (stating that "funeral homes generally maintain a familial approach to death which focuses upon the needs of the biological family and spouse rather than upon the articulated preferences of a testator"). *See also* Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31, 48 (2002) ("[E]ven assuming that a personal representative has the required authority, there remains the possibility that a third party, such as a funeral director or a cemetery, will refuse to honor the directions of the surviving partner, particularly where they are contrary to the wishes of the next of kin.").

67. *See In re* Estate of Strozzi, 903 P.2d 852, 857 (N.M. Ct. App. 1995) (stating that the natural objects of a decedent's bounty "are ordinarily those persons designated to inherit from him in the absence of a will").

68. *In re* Marshall, *supra* note 3, at pt. III. Judge Seidlin was "guided by Fla. Stat. § 406.50(4), which states, in relevant part: 'In the event more than one legally authorized person claims a body for interment, the requests shall be prioritized in accordance with § 732.103,' " of Florida's intestacy statute. *Id.* at pt. III.B.2.

69. *Id.* at pt. V. *See* FLA. STAT. ANN. § 732.103(1) (West 2006) (providing that "the entire intestate estate if there is no surviving spouse, descends . . . [t]o the lineal descendants of the decedent").

70. *In re* Marshall, *supra* note 3, at pt. III.B.3.

71. *Id.* at pt. IV. The appellate court affirmed this decision but used a different rationale–the guardian ad litem's commitment to fulfilling Anna Nicole Smith's intent to be buried in the Bahamas next to her son, Daniel. Arthur v. Milstein, 949 So. 2d 1163, 1166 (Fla. Dist. Ct. App. 2007).

The battle over Minnesota Twins Hall of Famer[72] Kirby Puckett's ashes provides another illustration of the family paradigm in action. On March 6, 2006, the forty-five-year-old baseball icon died in Arizona from a massive stroke.[73] Six days later, his body was cremated in Minnesota and his ashes kept in a local funeral home.[74] Puckett was survived by his fiancée, Jodi Olson; two children from a prior marriage; and six siblings.[75] Puckett and Olson had lived together since November 2004, had become engaged in October 2005, and had a wedding planned for June 24, 2006.[76] Olson "assumed the ashes would be left with [her] as Kirby was going to be [her] husband in just 90 days."[77] Unfortunately for Olson, the family paradigm defeated her claim. Because Olson was not Puckett's "legally recognized spouse," she was not entitled to his remains under either Arizona or Minnesota law.[78] Instead, an Arizona judge awarded the ashes to the legal guardian for Puckett's minor children.[79] That guardian turned out to be the very person Kirby Puckett would probably have least wanted to receive his remains: his ex-wife, Tonya.[80]

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72. Kirby Puckett played for the Minnesota Twins from 1984 until his retirement in 1996 and was elected to the Hall of Fame on the first ballot in 2001. Gordon Wittenmyer, *Hall of Famer and Twins Great Puckett Dies at Age 45*, PIONEER PRESS (St. Paul, Minn.), Mar. 6, 2006.

73. Dan Shaughnessy, *Puckett's Spirit Still with Twins*, BOSTON GLOBE, Mar. 8, 2006, at E6.

74. Richard Meryhew, *No Agreement on Who Will Get Puckett's Ashes; The Remains Could Be Given Solely to Puckett's Two Children or Be Shared with his Fiancee*, STAR TRIB. (Minneapolis, Minn.), May 4, 2006, at 1A.

75. *Id.*

76. Richard Meryhew, *Puckett's Fiancee: He Wanted Ashes Spread on Ball Field*, STAR TRIB. (Minneapolis, Minn.), May 9, 2006, at 1B.

77. *Id.* (quoting Jodi Olson). Olson planned to give some of Puckett's ashes to his children, to spread some of the ashes over an inner-city baseball diamond as Puckett reportedly had "often told her that he wanted," and to keep " 'a small bit' in a locket 'so [she] could feel Kirby close to [her] heart,' " but had also discussed giving some of Puckett's ashes to his children. *Id.* (quoting Jodi Olson).

78. *In re* Estate of Puckett, No. PB2006-000799, Release of Decedent's Remains, Conclusions of Law, nos. 4, 7 (Ariz. Super. Ct. Oct. 23, 2006), *available at* http://www.courtminutes.maricopa.gov/docs/Probate/102006/m2423197.pdf.

79. *Id.* at Release of Decedent's Remains, Order.

80. *Id.* at Release of Decedent's Remains, Findings of Fact, nos. 3, 6 (stating that "Brian Woods[,] . . . the duly appointed and acting Personal Representative of Decedent's Estate [and] . . . the Decedent's good friend and long-time business advisor . . . , relying upon his feelings and those opinions of a sampling of Decedent's friends, firmly believes that the Decedent would strongly oppose giving the Petitioner [Tonya Puckett] control over his remains in any capacity"); *see* Richard Meryhew, *Kirby Puckett's Fall From Grace*, STAR TRIB. (Minneapolis, Minn.), Oct. 31, 2006 (discussing Puckett's "bitter divorce [that] had made dealings with Tonya difficult" and limited his access to his children).

As the next Part will show, reformers have attempted to address the inequities of the family paradigm. These reforms, however, offer only limited responses in both the mortal remains and inheritance contexts.

III. THE LIMITS OF RECENT REFORM STRATEGIES

Legal scholars have proposed two main strategies to respond to the changing American family. They have proposed both modernizing the traditional definition of family and developing schemes to bypass the family paradigm altogether. These strategies fail because the proposals still assume and perpetuate the family paradigm.

A. Redefining "Family"

Trusts and estates scholars have proposed three main approaches to update traditional definitions of family to reflect today's diverse family composition and circumstances:[81] (1) the "formal" approach, (2) the "functional" approach, and (3) the "decedent-controlled" approach. The formal approach attempts to "bring 'new' families into the fold"[82] by expanding intestacy's narrow statutory definition of a decedent's "natural objects." The functional approach focuses instead on the relationship between a decedent and her survivors.[83] This approach bases inheritance rights on whether potential claimants "act[ed] like family members."[84] The decedent-controlled approach,[85] in contrast, emphasizes a decedent's own definition of her "family of choice."[86] This approach allows a decedent's "articulated preferences"[87] to trump traditional status-based rules of inheritance.

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81. *See* Foster, *supra* note 18, at 228–35 (presenting an analysis of trusts and estates scholars' approaches to updating the definition of family in inheritance law). For an extended discussion of the formal and functional approaches, see Gary, *supra* note 32, at 31–67.

82. Gary, *supra* note 32, at 31.

83. Foster, *supra* note 18, at 232.

84. *See* Gary, *supra* note 32, at 42 (describing the functional approach as "determin[ing] whether identified persons are acting like family members").

85. *See* Hernández, *supra* note 24, at 1017 (referring to "decedent-controlled definitions of family").

86. *Id.* at 981; *see also* Laura M. Padilla, *Flesh of My Flesh but Not My Heir: Unintended Disinheritance*, 36 BRANDEIS J. FAM. L. 219, 221 n.8 (1997–98) (referring to "families by choice or need," adopting the phrase from Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 U. LOUISVILLE J. FAM. L. 691, 691 (1996–97)).

87. Hernández, *supra* note 24, at 973.

Reformers in the mortal remains context have proposed variations of all three approaches. And, just as in the inheritance context, these three approaches are flawed because they retain "family" as their reference point.[88]

1. An Expanded Formal Definition of Family

The formal approach targets the common law and statutory default rules that apply in cases where a decedent leaves no directions regarding disposition of her body. As in inheritance law, these default rules assign rights based on the survivor's formal familial status. The decedent's spouse has the "paramount right"[89] to control disposition of the decedent's remains. If no spouse exists, then both common law and statutes "grant priority of decision-making in descending order of consanguinity of the deceased."[90]

Reformers have attacked this status-based scheme for excluding members of many of today's American families. They have focused particular attention on the plight of same-sex partners, but their arguments apply as well to unmarried opposite-sex partners.[91] Commentators have shown that a narrow definition of "spouse" effectively denies such partners the right to bury or cremate their loved ones.[92] At worst, they argue, the default rules allow legally recognized family members, who may well have disapproved of the

88. Foster, *supra* note 18, at 233.

89. *See In re* Dillon, 674 A.2d 735, 738 (Pa. Super. Ct. 1996) (stating that "the paramount right to possession and custody of a body and the concomitant right to control burial or other disposition rests with the surviving spouse of the deceased").

90. Horan, *supra* note 64, at 424. Unlike intestacy statutes, however, mortal remains statutes usually require that the decedent's next of kin be adults. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7100(a)(3), (5), (6) (West 2005) (limiting the "right to control the disposition of the remains of a deceased person, the location and conditions of interment, and arrangements for funeral goods and services" to "competent adult" children, siblings, and "persons . . . in the next degrees of kinship"). For a survey of "priority of decision laws," see Ann M. Murphy, *Please Don't Bury Me Down in that Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J. 381, 403–05 (2007).

91. *See, e.g.*, Horan, *supra* note 64, at 424–25 (arguing that "people in [lesbian or gay] relationships are passed over in the hierarchy of dispositional decision making"). Horan recognizes that "opposite sex domestic partners will have some of the same problems with the preference for spouses" but focuses her analysis on "same-sex couples because they are precluded by law from legally marrying and thus suffer a unique problem in this area that is legally difficult to rectify." *Id.* at 425 n.8.

92. *See, e.g.*, Maureen B. Cohon, *Where the Rainbow Ends: Trying to Find a Pot of Gold for Same-Sex Couples in Pennsylvania*, 41 DUQ. L. REV. 495, 511 (2003) ("But without written instructions, the disposition of the body as well as funeral arrangements may proceed without any input from the decedent's partner.").

decedent's lifestyle, to exclude a surviving partner "from the planning of funeral arrangements or even from the service itself."[93]

These concerns are well founded. Consider, for example, the experience of Tom, a forty-two-year-old businessman who lost his partner, Rob, to AIDS.[94] According to Tom, he and Rob "were together emotionally, romantically, and physically" for nearly a decade and lived together for four years.[95] Rob named Tom the executor of his estate.[96] Yet after Rob's death, Rob's parents, not Tom, were given custody of Rob's body.[97] As Tom discovered, "They had the legal rights to his body and I did not."[98] Rob's parents chose the date of the funeral service and took over all funeral arrangements.[99] At the service, Tom felt invisible, as if he had never shared a life with Rob: "This was his family's service, where I was treated as if I wasn't there. His family had his business partner stand in the receiving line at the funeral . . . . At the service, my family and I sat at the back."[100]

To ensure that partners receive the dignity and respect they deserve, reformers have called upon lawmakers to expand the list of family survivors entitled to control disposition of a decedent's remains.[101] Specifically, they have advocated granting surviving

93. MICHAEL SHERNOFF, GAY WIDOWERS: LIFE AFTER THE DEATH OF A PARTNER 145 (1977); *see also* Terry L. Turnipseed, *2005–2006 Survey of New York Law: Estates and Trusts*, 57 SYRACUSE L. REV. 1135, 1137 (2007) (arguing that the new New York law on disposition of remains "prevents what many would consider the horrific sight of a decedent's body being hastily taken away by blood family members and buried or cremated against the wishes of a surviving unmarried (opposite- or same-sex) partner, who previously could be excluded completely from arrangement planning"). In some cases, the surviving partner or the decedent may want to exclude the decedent's biological family members. *See* Wojcik, *supra* note 64, at 422–23 (stating that "[t]he life partner in a non-traditional family . . . may want a service that . . . perhaps even exclude[s] family who neglected the deceased because of objections to a 'chosen lifestyle' "); Mark E. Wojcik, *Discrimination After Death*, 53 OKLA. L. REV. 389, 400 (2000) ("In cases where a gay son or lesbian daughter has been estranged from their biological families because of their sexual orientation, that son or daughter may generally want decisions about a funeral service to be made by a life partner or intimate friends rather than the estranged family.").

94. CAROLYN AMBLER WALTER, THE LOSS OF A LIFE PARTNER: NARRATIVES OF THE BEREAVED 143 (2003) (reporting the case of "Tom" and "Rob").

95. *Id.* at 143–44 (quoting Tom).

96. *Id.* at 146.

97. *Id.*

98. *Id.* (quoting Tom).

99. *Id.* at 146, 206.

100. *Id.* at 147 (quoting Tom).

101. *See, e.g.*, Gay Men's Health Crisis, The Case for Disposition of Remains Legislation, http://www.gmhc.org/policy/nys/drl_case.pdf (last visited Aug. 26, 2008) (stating that "[t]he right to control how one's body is handled after death injects dignity and simplicity into an area too often fraught with fear and discomfort" and supporting New York legislation that would allow "domestic partners . . . [to] assume their rightful place as being equivalent to spouses for the purposes of disposition of their loved one's remains . . . [and] recogniz[e] the growing variety of

"domestic partners" the same status as surviving spouses.[102] Several legislatures have moved towards this definition. For example, in 2006, New Jersey amended its statutory default rules to grant "the surviving domestic partner" as well as "[t]he surviving spouse of a decedent" first priority "to control the funeral and disposition of human remains."[103] A few states have gone beyond the same-sex context to recognize other committed relationships. Just last year, Washington amended its statutory default rules to give "domestic partners" and spouses the same status.[104] Washington, however, adopted a broader definition of "domestic partner" to encompass not only survivors of same-sex relationships but also survivors of opposite-sex relationships where one partner was at least sixty-two years of age.[105] Maine's definition of "domestic partner" is even more inclusive: "[O]ne of 2 unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare."[106]

Statutes that explicitly recognize both adopted and biological children or siblings provide another illustration of the formal approach in action. For example, California law specifies that "a natural or adopted child of the decedent"[107] has the right to control disposition of the decedent's remains. Until May 2007, a Minnesota statute extended such a right to "biological or adopted" children and

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family units which constitute the diverse cultural tapestry of this State"). Today, New York does in fact assign domestic partners the same status as spouses. N.Y. PUB. HEALTH LAW § 4201(2)(a)(ii-a) (Consol. 2008).

102. *See, e.g.*, Horan, *supra* note 64, at 458 ("Ideally, legislators would amend their statutes regarding disposition of the body to include the domestic partner equal to spouse within the hierarchy of decision-makers."); W. BRAD JARMAN, RESTING IN PEACE: AN ANALYSIS OF DISPOSITION OF REMAINS LAWS 21–22, 24–25 (Gay Men's Health Crisis 2004), *available at* http://www.gmhc.org/policy/nys/dispos_remains_0804.pdf (stating that the priority list is particularly "problematic" for domestic partners, "especially considering the prominent placement of spouses in the priority list" and stating that New York should enact "a back-up priority list which makes domestic partners legally equivalent to spouses").

103. 2005 N.J. Laws 331, § 29 (amending N.J. STAT. ANN. § 45:27-22(a)(1) (West 2005)).

104. 2007 Wash. Sess. Laws 156, § 24 (amending WASH. REV. CODE § 68.50.160(3)(a) (2007)).

105. *Id.* § 4(6)(b). In addition, the domestic partners must "share a common residence," be adults, be married or a domestic partner of no one other than the partner, be "capable of consenting to the domestic partnership," be "not nearer of kin to each other than second cousin . . . [, and not] a sibling, child, grandchild, aunt, uncle, niece, or nephew to the other person." *Id.* § 4(1)–(5).

106. ME. REV. STAT. ANN. tit. 22, § 2843-A(1)(D)(1-A) (West Supp. 2005). The most recent commentator on mortal remains legislation, Tracie Kester, has proposed a uniform bodily remains law that includes, *inter alia*, the Maine definition of "domestic partner." Kester, *supra* note 64, at 605.

107. CAL. HEALTH & SAFETY CODE § 7100(g) (West Supp. 2005).

siblings.[108] For reasons that are not explained in the legislative history, that language was removed.

The formal approach to modernizing the definition of family is flawed in two respects. First, nearly all proposals and statutory reforms extend rights only to survivors of legally registered committed relationships or to legally adopted relatives.[109] Just as in the inheritance context, reformers have thus accepted the conventional statutory definition of family as "based on blood or formal legal registration processes."[110] They have attempted to squeeze new forms of relationships into existing family categories.[111] As a result, they continue to exclude those who cannot[112] or choose not[113] to enter into such relationships.

Second, reformers address only a few aspects of the narrow definition of family. They focus on the outdated definition of "spouse" and, more rarely, "child" and "sibling." Interestingly, unlike their trusts and estates counterparts, proponents of the formal approach in the mortal remains context have largely ignored the claims of other nontraditional family members, such as blended family members, extended family members, and nonrelatives.[114] Yet, as one foreign

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108. 2007 Minn. Laws ch. 114, § 40 (amending MINN. STAT. § 149A.80, subdiv. 2(3), (5) (2006)).

109. The Maine statute may be an exception. Although the statute includes registration requirements for "registered domestic partners," ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2005), it does not use the term "*registered* domestic partner" in the provisions on "custody of remains of deceased persons." *Id.* § 2843-A(1)(D)(1-A) (emphasis added). Instead, it uses the term "domestic partner." *Id.* In addition, the New York statute defines "domestic partner" to include survivors of both registered and nonregistered relationships. A domestic partner is a person who is formally recognized under federal, state, local, or foreign law as a party to a domestic partnership or similar relationship or registered as the decedent's domestic partner with any registry maintained by either party's employer or any state, municipality, or foreign jurisdiction; or is formally designated as beneficiary or covered person under the decedent's employment benefits or health insurance; or was "dependent or mutually interdependent on the . . . [decedent] for support, as evidenced by the totality of the circumstances indicating a mutual intent to be domestic partners . . . ." N.Y. PUB. HEALTH LAW § 4201(1)(c) (Consol. 2008).

110. Gary, *supra* note 32, at 31–32.

111. *Id.* at 60 (stating that the formal approach "does not attempt to incorporate new family structures, but rather seeks to squeeze the new family structures into existing rules").

112. For example, statutes that apply only to same-sex partners would exclude survivors of opposite-sex relationships of support and affection that are not spousal-type relationships.

113. *See* Foster, *supra* note 18, at 233–34 n.180, 247 n.241 (discussing and citing work by feminist and lesbian and gay scholars that expressly rejects assimilation into conventional marital categories on ideological or personal grounds); *see also* Spitko, *An Accrual/Multi-factor Approach*, *supra* note 35, at 260 n.17 ("The partners might choose not to register their relationship for fear of discrimination they might suffer as a consequence of registration.").

114. A possible exception may be Ohio legislation. In 2006, Ohio enacted a law that explicitly extends "the right of disposition" to half-siblings as well as whole-siblings. H.R. 426, 126th Gen. Assemb., Reg. Sess. (Ohio 2006) (enacting, *inter alia*, OHIO REV. CODE ANN. § 2108.81(B)(4) (West 2008)). One commentator has discussed a related issue–burial conflicts between divorced

commentator has observed, "changing social trends resulting in fragmentation of the traditional family unit and increasingly diverse close personal relationships . . . suggest there is every likelihood that the number of burial conflicts will increase."[115]

Exceptions exist, however. Close analysis of recent legislation reveals that a few mortal remains statutes do what intestacy does not. They give explicit recognition to those most excluded by the family paradigm: survivors who were closest to the decedent by affection rather than family status.[116] For example, North Carolina's statutory default rules provide that "[a] person who has exhibited special care and concern for the decedent," "may authorize the type, method, place, and disposition of the decedent's body."[117] District of Columbia legislation extends similar rights to "[a]n adult friend or volunteer."[118]

Yet these promising provisions do not truly challenge the family paradigm. Although they acknowledge the existence of nonrelated loved ones, they allow such individuals to control disposition of a decedent's remains only if no "natural" family members survive the decedent.[119] This approach effectively defines a decedent's survivors as family and "others." It sends the message that "love and feelings in some relationships just do not matter because the . . . status of these relationships is not traditional or legal."[120]

2. A Functional Definition of Family

The functional approach considers the specific relationship between a decedent and her survivors. It "ask[s] whether the relationship has the characteristics of a family and fulfills the goals and needs of that relationship."[121] Proponents of the functional approach apply this model to effectuate two goals: (1) extending rights to nontraditional family members who are not included in the "formal"

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parents of the decedent–and has proposed a model interment statute to specify the rights of such parents. Theresa E. Ellis, Note, *Loved and Lost: Breathing Life into the Rights of Noncustodial Parents*, 40 VAL. U. L. REV. 267, 293–98, 308–09 (2005).

115. Heather Conway, *Dead but Not Buried: Bodies, Burial and Family Conflicts*, 23 LEGAL STUD. 423, 452 (2003).

116. Foster, *supra* note 18, at 234, 245–48.

117. N.C. GEN. STAT. § 130A-420(b)(6) (2007).

118. D.C. CODE § 3-413(a)(5) (2001).

119. For example, the North Carolina statute lists its provision at the bottom of the hierarchy after "persons in the classes of the next degrees of kinship, in descending order, who, under State law, would inherit the decedent's estate if the decedent died intestate." N.C. GEN. STAT. § 130A-420(b)(5), (6). For a similar critique of the New Mexico statute, see Horan, *supra* note 64, at 444.

120. Arriola, *supra* note 86, at 694.

121. Horan, *supra* note 64, at 447.

definition of family and (2) adjusting rights of legally recognized family members to reflect lifetime behavior toward the decedent.

Under the functional approach, like the formal approach described in the previous Section, reformers seek to expand the traditional definition of family to include additional members of today's American family. The focus is different, however. Rather than challenging the statutory list of "natural" family members, proponents of the functional approach emphasize the meaning of family.[122] They call for a case-by-case analysis of whether the particular relationship between survivor and decedent functioned in a manner analogous to that of family members.[123] As Professor Hernández has observed, "The functional approach legitimizes non-nuclear relationships that share the essential qualities of traditional relationships for a given context by inquiring whether a relationship shares the main characteristics of caring, commitment, economic cooperation and participation in domestic responsibilities."[124]

A 1993 New York case illustrates how a functional approach might work in assigning rights to a decedent's body. *Stewart v. Schwartz Brothers-Jeffer Memorial Chapel, Inc.* involved a dispute over disposition of Drew Stanton's remains between his partner of five years, Michael Stewart, and Stanton's mother and brother, Joyce and Scott Sobel.[125] The Sobels claimed that Stewart lacked standing because he was neither Stanton's surviving spouse nor next of kin as required by New York law at that time.[126] The court acknowledged that Stewart did "not fit neatly into the legal definition of a spouse or kin"[127] but nonetheless concluded that Stewart had standing because of "the close, spousal-like relationship that existed between [Stewart] and his 'significant other.' "[128] The court cited a number of facts to support its decision. "Stanton and Stewart, both physicians, had been

122. *See* Gary, *supra* note 32, at 42 ("Initially, a functional approach raises the question of what a family is rather than who is in the family.").

123. *See* Horan, *supra* note 64, at 447 ("The fact-intensive, functional approach requires the court to look closely at the relationship and ask whether the relationship has the characteristics of a family and fulfills the goals and needs of that relationship."); Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1646 (1991) ("Instead of focusing on the identities and formal attributes of the individuals within a relationship, the functional approach inquires whether a relationship shares the essential characteristics of a traditionally accepted [family] relationship and fulfills the same human needs.").

124. Hernández, *supra* note 24, at 1006.

125. Stewart v. Schwartz Bros.-Jeffer Mem'l Chapel, Inc., 606 N.Y.S.2d 965, 966 (N.Y. Sup. Ct. 1993).

126. *Id.* at 967–68.

127. *Id.* at 968.

128. *Id.*

lovers and companions for the previous five years."[129] "[T]he two occupied"[130] a house that Stanton constructed. Stewart was the executor and sole beneficiary of Stanton's estate.[131] Finally, Stewart "was building a future"[132] with Stanton. Thus, to deny Stewart standing would "illustrate a callous disregard of Stanton's and Stewart's relationship."[133] It should be noted, however, that although the court used a functional approach, it stopped short of defining Stewart as Stanton's "family" member.[134] Instead, it found that the relationship between the two made Stewart the best "representative of Stanton's wishes for the disposition of his remains."[135]

The *Stewart* case reveals a second possible application of the functional approach: evaluating whether survivors who are legally entitled to a deceased relative's remains in fact behaved like family members[136] toward the decedent. The court recognized that Stanton's biological family members had the "general right to possession of the decedent's remains."[137] At the same time, however, the court emphasized that the actual relationship between family members and a decedent could trump this legal right: "The general rule giving the right to determine the method of disposal of a decedent's remains to the family is far from being absolute, especially in the present case where the relations between Stanton and his family were strained."[138]

As in the inheritance context,[139] proponents of a functional approach focus principally on "unworthy" survivors. They have sought to exclude "undeserving next of kin"[140] for not behaving toward the decedent as a family member should. In her 2007 proposed Uniform Disposition of Bodily Remains Act, Tracie Kester disqualifies "[a] person who has been arrested for unlawfully and intentionally committing an act against the decedent that resulted in or contributed

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129. *Id.* at 966.

130. *Id.*

131. *Id.*

132. *Id.* at 968.

133. *Id.*

134. *Id.* at 967 ("[E]ven if the plaintiff had claimed to be the surviving spouse or next of kin this court would have been hesitant to extend that status to him.").

135. *Id.*

136. *See* Gary, *supra* note 32, at 42 (discussing how a determination should be made as to whether one has acted like a family member).

137. *Stewart*, 606 N.Y.S.2d at 968.

138. *Id.* at 967. "[T]he plaintiff related that Stanton was alienated from his mother and brother and that Stanton was particularly upset with his mother because she had ignored his father's wish to be cremated and had him buried instead." *Id.* at 966.

139. *See supra* notes 27–59 and accompanying text.

140. Kester, *supra* note 64, at 588.

to the death of the decedent . . . [, t]he spouse of the decedent if the spouse and decedent are legally separated or divorced at the time of the death of the decedent[141] . . . [, and t]he decedent's parent if that parent's parental rights have been terminated by court order."[142]

Several state legislatures have gone still further recently, adopting expansive behavior-based schemes that extend to misconduct seldom addressed in inheritance law. For example, Ohio's 2006 legislation[143] explicitly excludes those charged with domestic violence that resulted in or contributed to the decedent's death.[144] Similarly, in March 2007,[145] Utah enacted a statute that requires a person who was "estranged" from the decedent at the time of the decedent's death to forfeit her "right of disposition."[146] The statute defines "estranged" broadly as "a physical and emotional separation from the decedent at the time of death which has existed for a period of time that clearly demonstrates an absence of affection, trust, and regard for the decedent."[147]

A few legislatures even include provisions in mortal remains statutes that are noticeably absent from intestacy statutes:[148] provisions that factor in family members' "good" as well as "bad" behavior toward the decedent. Minnesota legislation is illustrative. Section 149A.80 states that "[w]hen a dispute exists regarding the right to control or duty of disposition . . . [among] more than one person with the same degree of relationship to the decedent . . . , the court shall consider . . . the degree of personal relationship between the decedent and each of the persons in the same degree of relationship to the decedent."[149]

Although the functional approach offers a more nuanced and updated definition of family, it too is ultimately "undermined by its family perspective."[150] As Professor Gary has observed, "If the

141. Under section 5 of the proposed law, a spouse is also excluded if she "abandoned the deceased person prior to the deceased person's death." *Id.* at 605.

142. *Id.* at 607.

143. H.R. 426, 126th Gen. Assemb., Reg. Sess. (Ohio 2006).

144. OHIO REV. CODE ANN. § 2108.77(B)(1) (West 2008). However, "[i]f the charges . . . are dismissed or if the person is acquitted of such charges, the right is restored to the person." *Id.* § 2108.77(B)(2).

145. 2007 Utah Laws 144, § 14 (enacting UTAH CODE ANN. § 58-9-603 (2008)).

146. UTAH CODE ANN. § 58-9-603(2)(C).

147. *Id.* § 58-9-603(1).

148. *See* Foster, *Towards a Behavior-Based Model*, *supra* note 20, at 102, 125–26 (discussing Chinese legislation that rewards "good" behavior); Foster, *Linking Support and Inheritance*, *supra* note 20, at 1239, 1257 (same).

149. MINN. STAT. § 149A.80, subdiv. 5(2) (2006).

150. Foster, *supra* note 18, at 234.

functional definition of family is based on the way a nuclear family functions, then many non-traditional families may still be left out of the definition."[151] Even the most recent proponent of the functional approach has acknowledged its "risks" for the nontraditional families it is supposed to encompass: "As courts search for what it means to be a family, there is a risk of a 'force[d] conformance to heterosexual models.' Furthermore, the risk exists that the courts will zero in on a few factors as dispositive and ignore the larger question, 'Do they function as a family?' "[152]

Because of these risks, reformers have explored another approach to redefining the family, one that does not require application of conventional notions of "family" behavior and functions.

3. A Decedent-Controlled Definition of Family

The decedent-controlled approach rejects all external definitions of family—be they legislative, judicial, or societal—and permits the decedent to specify her own definition of family.[153] As Professor Mary Clark has explained, "the deceased's next of kin . . . [are] defined broadly to include whomever the deceased him or herself designates[,] whether family (by blood, marriage, or otherwise), close friends, or other intimates."[154]

According to Professor Hernández, recently adopted mortal remains legislation in Oklahoma, Oregon, and Texas[155] offers the ideal mechanism to promote the "autonomy of the individual to construct families of choice."[156] This legislation expressly authorizes execution of a legally binding document by which a decedent can assign control over her remains to a "proxy."[157] Professor Hernández concluded that such legislation thus "respects the changing definition of the family by permitting a decedent to choose the person with whom he or she feels a close familial connection to act as his or her agent," rather than assuming biological members have this connection.[158]

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151. Gary, *supra* note 32, at 42.

152. Horan, *supra* note 64, at 456.

153. Hernández, *supra* note 24, at 1023 (proposing the decedent-controlled approach that allows the decedent to define her "family of choice").

154. Mary L. Clark, *Keep Your Hands Off My (Dead) Body: A Critique of the Ways in Which the State Disrupts the Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death*, 58 RUTGERS L. REV. 45, 89 (2005).

155. Hernández, *supra* note 24, at 973.

156. *Id.* at 1007–08.

157. *Id.* at 973. For a discussion of "personal preference laws," with specific focus on Illinois legislation, see Murphy, *supra* note 90, at 406–07.

158. Hernández, *supra* note 24, at 1026–27.

Since publication of Professor Hernández's article, one state legislature has passed a statute implementing a decedent-controlled definition of family. In 2003,[159] Missouri enacted statutory default rules for "custody, control, and disposition of deceased human remains"[160] that allow a decedent to choose her own definition of family. Section 194.119(8) provides that "[a]ny person may designate an individual to be his or her closest next-of-kin, regardless of blood or marital relationship, by means of a written instrument that is signed, dated, and verified."[161]

Despite its advantages, the decedent-controlled approach shares the same flaw as the formal and functional approaches: its family perspective. By limiting its scope to "any person that a [decedent] may have preferred and viewed as *family*,"[162] this approach raises an initial definitional question: Did the decedent regard the claimant as a family member?[163] As a result, even the decedent-controlled approach's more flexible, individualized definition of "family" is inadequate. It excludes survivors whom a particular decedent may have regarded as her nearest and dearest but not as members of her family.[164]

B. Bypassing the Family Paradigm

Reformers have proposed a second strategy for dealing with the family paradigm's underinclusiveness. Rather than attempt to modernize the paradigm's definition of family, they have explored schemes to avoid the paradigm altogether.

1. Mechanisms for Decedents to Override Family-Based Default Rules

For over two decades, legislators, judges, scholars, and practitioners in the trusts and estates field have promoted testamentary and nontestamentary devices to avoid application of

159. H.R. 394, 92nd Gen. Assemb., Reg. Sess. (Mo. 2003) (enacting MO. REV. STAT. § 194.119 (2007)).

160. MO. REV. STAT. § 194.119(2).

161. *Id.* § 194.119(8). The future of this provision is uncertain, however. The Missouri legislature is currently considering a bill that would repeal section 194.119(8). S. 1025, 94th Gen. Assemb., 1st Reg. Sess. (Mo. 2008).

162. Hernández, *supra* note 24, at 1018 n.259 (emphasis added).

163. Foster, *supra* note 18, at 234.

164. *Id.* The focus on "family" may also harm nontraditional family members because "[o]nce again, the nuclear family may serve as the benchmark at the expense of a decedent's nonconforming 'family of choice.'" *Id.*

family-based intestacy rules to estates. Recognizing that technical defects in wills give courts the opportunity to void the wills and revert to family-based intestacy, reformers have liberalized will execution requirements,[165] excused "harmless errors,"[166] and reformed wills to effectuate a testator's intended disposition of her property.[167]

Reformers have also focused attention on what Professor John Langbein has called the "nonprobate revolution."[168] They have shown that will substitutes, such as revocable trusts, allow testators to distribute their wealth outside the family paradigm-oriented probate system.[169] Proponents have argued that these techniques are particularly useful for individuals whose loved ones do not fit society's notion of "natural objects of the testator's bounty."[170] As a result, will substitutes have become a staple of estate planning for those most harmed by the family paradigm: unmarried same-sex or opposite-sex cohabitants, "nontraditional" elders, and other "nonconforming" testators.[171]

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165. *See, e.g.*, UNIF. PROBATE CODE § 2-502 (amended 1993) (explaining the requirements for a valid will); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009 (1992) (discussing the 1990 UPC's implications for the "formalist" system that characterized will execution); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033 (1994) (discussing the 1990 UPC's effects on the formalities associated with will execution).

166. *See, e.g.*, UNIF. PROBATE CODE § 2-503 (amended 1997) (setting out harmless error rule); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999) ("[e]xcusing [h]armless [e]rrors"); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987).

167. *See, e.g.*, Erickson v. Erickson, 716 A.2d 92 (Conn. 1998) (allowing extrinsic evidence of scrivener's error to establish decedent's true intent that his will provide for the contingency of marriage, even though the will did not so provide on its face); RESTATEMENT (THIRD) OF PROP: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (2003) (permitting reform of "[a] donative document, though unambiguous, . . . to conform the text to the donor's intention if . . . [it is] established by clear and convincing evidence . . . that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and . . . what the donor's intention was"); John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982) (discussing an apparent increasing willingness of courts to abandon the "old" rule of no reformation on the ground of mistake).

168. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984).

169. *See, e.g.*, Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 571 (2008) (discussing the use of revocable trusts to "avoid the costs, strictures, and family bias of the probate system and give settlors control over their property at death as well as during life").

170. *See, e.g.*, Jennifer Tulin McGrath, *The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples*, 27 SEATTLE U. L. REV. 75, 93–94 (2003) (discussing the benefits of revocable trusts for nontraditional couples); Matthew R. Dubois, Note, *Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263, 322 (1999) (recommending revocable trusts for gay, lesbian, or "non-traditional elders").

171. Foster, *supra* note 169, at 571. For extended discussion of "nonconforming" testators, see E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from*

Similarly, reformers in the mortal remains context have explored testamentary and nontestamentary mechanisms to bypass family-oriented default rules. Early reformers argued that a properly executed will was the optimal method to effect such a bypass and ensure a decedent's wishes were enforced after her death. For example, in a 1930s legal opinion, a Boston law firm "advise[d] . . . [that] such instructions should be contained in the will, in order that they may have the benefit of the special sanction and force of that instrument."[172] Proponents of the use of explicit will provisions emphasized that "[u]nder the majority American rule, the wish of the deceased expressed in his will is preferred over the desire of any other person."[173]

More recent commentators have looked beyond wills[174] to a variety of other written[175] instruments to promote a decedent's control over her remains.[176] For instance, the Oklahoma Bar Association recommended that senior citizens leave a separate "[l]etter of instruction regarding [their] funeral, burial, and related matters."[177]

Majoritarian Cultural Norms Through Minority-Culture Arbitration, 49 CASE W. RES. L. REV. 275 (1999).

172. RICHARD W. HALE & RAYMOND B. ROBERTS, THE CREMATION OF THE DEAD AND THE RIGHT TO CONTROL THE DISPOSITION OF ONE'S BODY 10 (legal opinion of the Hale & Dorr law firm to the Massachusetts Cremation Society) (on file with the Vanderbilt Law Review).

173. Berman Swartz, Comment, *Property-Nature of Rights in Dead Bodies-Right of Burial*, 12 S. CAL. L. REV. 435, 440 (1939). For a more recent source recommending use of a will, see Dubois, *supra* note 170, at 320–21 (stating that "[a] last will and testament should contain . . . any instructions regarding a funeral or other disposition of remains").

174. Commentators have cited a number of disadvantages of using a will to set out directions for disposition of remains. For example, a will might not be read or even located until it is too late to implement the decedent's instructions–after the decedent's burial or cremation. *See, e.g.*, Hernández, *supra* note 24, at 1020; Horan, *supra* note 64, at 427; Kester, *supra* note 64, at 584. For other objections to wills, see Hernández, *supra* note 24, at 1019–21 (citing, *inter alia*, the ambulatory nature of wills and the requirements associated with revoking a will); Horan, *supra* note 64, at 427–28 (citing possible challenges to the will); JARMAN, *supra* note 102, at 13–15 (citing the cost associated with wills and the fact that many people do not even utilize wills in testamentary planning).

175. Although courts have enforced oral instructions, *see* PERCIVAL E. JACKSON, THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES 48 (2d ed. 1950); *infra* notes 298–309 and accompanying text, commentators have advocated the use of written instruments. *See, e.g.*, HALE & ROBERTS, *supra* note 172, at 10 ("A clearly expressed oral request is probably sufficient; but it has neither the sanction nor the freedom from mistake and error of directions written and signed.").

176. For an overview of possible documents to be used in disposition of remains, see, for example, JARMAN, *supra* note 102, at 6–20.

177. OKLAHOMA BAR ASSOCIATION, YOUNG LAWYERS DIVISION, SENIOR CITIZENS HANDBOOK 49 (Myra Palevsky & Cathy Nickel eds., 3d ed. 2001), *available at* http://www.okbar.org/public/brochures/srhandbk.htm. It should be noted, however, that a letter of instruction may not accomplish the decedent's desired disposition. *See* KENNETH V. ISERSON, DEATH TO DUST: WHAT HAPPENS TO DEAD BODIES? 561 (1994):

In 2005, the Connecticut legislature enacted a bill that gave decedents broad authority to specify burial or other arrangements in a signed, witnessed "written document."[178] According to one of the bill's supporters, its goal was to "mak[e] it clear under our law that each of us, and each one of our constituents has the ability to make the decisions in advance regarding the disposition of their own remains and their own personal funeral arrangements."[179]

Still other reformers, including Professor Hernández,[180] have advocated the use of a "proxy" or "agent" to bypass the family paradigm. This is particularly true in the same-sex couple context. Thus, the Gay and Lesbian Advocates and Defenders advised Rhode Island same-sex couples to execute a signed, notarized document naming their partner or friend a "funeral planning agent" to avoid the rule that "[u]pon death, a person's body is given to his or her next-of-kin."[181] Similarly, the Gay Men's Health Crisis successfully lobbied in favor of New York proxy legislation that allows individuals to override family default rules and thus provides them "the ability to rest assured that the loved one of their choice will have control of their remains and carry out their wishes after they are deceased."[182]

Some commentators have looked instead to contractual methods to avoid family disputes over remains. Specifically, they have recommended "preneed funeral plans." These plans are prepaid contracts with funeral homes to ensure that individuals get the funeral arrangements they want, rather than allowing "family

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> President Franklin D. Roosevelt . . . left explicit instructions for his funeral in a four-page letter dated December 26, 1937. He wanted a very simple funeral with no hearse, lying-in-state or embalming, and burial in an unlined grave in a plain wooden casket. Unfortunately, these instructions were found in his safe three days after his burial.

178. S. 1124, 2005 Leg., Jan. Sess. (enacting CONN. GEN. STAT. § 45a-318 (West Supp. 2006)).

179. Conn. House Transcript, June 3, 2005 (statement of Rep. Lawlor), *available at* http://web2.westlaw.com.

180. *See supra* notes 155–58 and accompanying text. Unlike Professor Hernández, however, these proponents of proxy legislation have not emphasized its use to allow a decedent to define her own family.

181. GAY & LESBIAN ADVOCATES & DEFENDERS, RHODE ISLAND: OVERVIEW OF LEGAL ISSUES FOR GAY MEN, LESBIANS, BISEXUALS AND TRANSGENDER PEOPLE 22 (2007), *available at* http://www.glad.org/rights/LGBT_Overview_RI.pdf. *See* Daryl J. Finizio, *Funeral Planning Agent Designation: An Unused, But Useful, Tool for Same-Sex Couples*, 55 R.I. BAR J. 31 (2007) (discussing the Rhode Island funeral planning agent legislation).

182. Gay Men's Health Crisis, *supra* note 101. *See also* Philip Ankel, *Where There's A Will . . .*, 1993 WIS. L. REV. 961, 962–63 (discussing the adverse impact of family default rules on gay men with AIDS and recommending that Wisconsin adopt legislation that allows decedents to designate friends or partners as agents for disposition of remains).

emotions . . . [to] drive decisions"[183] after an individual's death. Indeed, some proponents have argued that "courts should be even more zealous in enforcing the decedent's wishes which are expressed in a valid contract than those expressed in a will, because in the former case the decedent has paid in advance for the execution of his wishes."[184] A few legislatures expressly endorse such contractual arrangements. For example, in 1994, the Idaho legislature gave "prearranged funeral plans" the highest priority to control disposition of a decedent's remains.[185] Section 54-1140 proclaims that "the remains of a person must be disposed of as instructed in such instrument," "[u]nless a compelling public interest makes it impossible" to do so.[186] According to one commentator, this legislation was designed to respond to the problem of "[m]ultiple marriages and serial relationships . . . with current spouses, former spouses, live-in partners and children of different parents each making demands on such issues as final disposition of a body."[187]

While most reformers have focused on the use of testamentary and nontestamentary documents to bypass the family paradigm, a few American and foreign commentators have suggested an additional, far more controversial reform to promote enforcement of such documents. They have proposed "treat[ing] the dead body as property."[188] These reformers emphasize the "sacred" status of property in the common law tradition.[189] Property, they argue, "is the highest form of legal right, so there are advantages to a person who can be regarded as the 'owner' of 'property.' "[190] These reformers conclude that the "best way"[191] to ensure that decedents rather than family survivors control disposition of remains is to "recognize a property interest in the human body that vests in the decedent."[192]

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183. Gary Williams, *Commentary: Explore Options to Prepay a Funeral*, DAILY REC. (Balt., Md.), Oct. 4, 2005.

184. HALE & ROBERTS, *supra* note 172, at 5.

185. 1994 Idaho Sess. Laws 423, §§ 1–4.

186. IDAHO CODE ANN. § 54-1140 (2008). A prearranged funeral plan thus overrides family rights to control disposition of a decedent's remains. *Id.* § 54-1142(1)(d)–(f), (i) (providing family default rules "in [the] absence of [a] prearranged funeral plan").

187. Carl Gidlund, *Rituals After Death*, SPOKANE SPOKESMAN-REV., Feb. 17, 2007, at 4.

188. Prue Vines, *The Sacred and the Profane: The Role of Property Concepts in Disputes About Post-Mortem Examination*, 29 SYDNEY L. REV. 235, 236 (2007). *See also* Michelle Bourianoff Bray, Note, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 211 (1990) ("propos[ing] the creation of a market-inalienable property right in the human body"); Horan, *supra* note 64, at 437–42 (same).

189. Vines, *supra* note 188, at 245.

190. *Id.*

191. Horan, *supra* note 64, at 442.

192. *Id.* at 437.

In both the inheritance and mortal remains contexts, the proposed testamentary and nontestamentary schemes are by no means guaranteed to achieve their goal: avoidance of the family paradigm. For example, if the decedent executed a document that did not meet statutory requirements for a valid disposition of her assets or remains, the family default rules would apply.[193] Only compounding the problem is what Professor Adam Hirsch has called the "tangle of disparate rules."[194] Mortal remains legislation provides a prime illustration of the inconsistency in formal requirements. If a Virginia resident wanted to designate a particular individual to make arrangements for disposition of her remains after her death, she would have to make that designation "in a signed and notarized writing, which has been accepted in writing by the person so designated."[195] A Minnesota resident, in contrast, would face no such statutory hurdles to achieving the same objective. She could "direct the preparation for, type, or place of [her] final disposition, either by oral or written instructions."[196] If the Minnesota resident subsequently moved to another state, however, she would have no assurance that this directive would remain valid and override family default rules.[197]

Will substitutes present another possible obstacle to bypassing the family paradigm: fraud. Mass marketing of revocable trusts, for example, has become "one of the fastest growing consumer blitzes in

193. *See, e.g.*, Stevens v. Casdorph, 508 S.E.2d 610, 613 (W. Va. Ct. App. 1998) (ruling that the estate passed by intestacy because the testator and the witnesses to the testator's will did not sign or acknowledge their signatures in the presence of each other as required by the will execution statute).

194. Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1070 n.39 (1996) (referring to will substitutes).

195. VA. CODE ANN. § 54.1-2825 (2008).

196. MINN. STAT. ANN. § 149A.80, subdiv. 1 (West 2006).

197. *See* Kester, *supra* note 64, at 592:

> [T]he differences in the laws from state to state create a hardship for people who frequently move or travel. A person moving from one state to another would have to research the laws of the new state to determine whether his current bodily remains directive would be valid. Furthermore, the person might discover that he no longer had a right to appoint an agent, or that he could not specify where his remains should be interred.

In response, Ms. Kester has proposed "a uniform law . . . [to] reduce the confusion created by the differences among state laws with respect to bodily remains." *Id.* at 593. For a summary of state disposition of remains laws, see JARMAN, *supra* note 102, at 30–35.

the nation."[198] Scam artists posing as "certified trust advisors"[199] have fleeced vulnerable and unwary Americans of their life savings.[200]

Trust marketers hawk their product as the "cure-all"[201] for probate, a supposedly foolproof device to give the property owner complete control over disposition of her estate.[202] Thousands of dollars later,[203] the purchaser ends up with a kit of worthless trust documents that are invalid under state law.[204] As a result, whatever assets she has left will be distributed at death to those her state legislature defines as the "natural objects of her bounty"—her closest relatives—rather than her chosen beneficiaries.[205]

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198. Ken Salazar, *Living Trust Scams* (on file with the Vanderbilt Law Review).

199. Jeanne Finberg, *Financial Abuse of the Elderly in California*, 36 LOY. L.A. L. REV. 667, 669 (2003) ("The scam artists often call themselves 'certified trust advisors' or estate planning experts, but they are not experts and usually not certified by anyone.").

200. *See CBS Evening News: Scam Artists Setting Up Phony Living Trusts Can Strip Seniors of Their Life Savings*, (CBS television broadcast Mar. 14, 2003) (transcript available at LEXIS, News Library, All News File) (discussing how "scam artists are using living trusts to fleece the trusting" and stating that "California's attorney general says just one company, the Alliance For Mature Americans, took millions from the elderly"). For an extended discussion of the human costs of living trust scams to vulnerable settlors, see Foster, *supra* note 169, at 584–95.

201. Charles F. Gibbs, *The Marketing of Living Trusts by Non-Attorney Promoters*, 20 ACTEC NOTES 193, 193 (1994).

202. *See* Angela M. Vallario, *Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad*, 59 MD. L. REV. 595, 598 & n.14 (2000) (discussing living trust marketers' "unfulfilled promises"); State Bar of Montana, Living Trust Scams and the Senior Consumers, http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=29 (last visited Aug. 27, 2008) (summarizing and refuting "Fraudulent and Misleading Statements Used in Living Trust Scams").

203. "The average cost of the living trust forms is $2000." Vallario, *supra* note 202, at 596 n.3. *See also* Lawrence Walsh, *If You Want a Living Trust, Use a Lawyer You Can Trust*, PITTSBURGH POST-GAZETTE, Nov. 22, 2002, at C4 (stating that Pennsylvania victims of living trust scams "are pressured into spending $2000 to $3000" for living trust kits).

204. Penn. Office of Attorney Gen., Beware of Living Trust Scams, http://www.attorneygeneral.gov/consumers.aspx?id=304 (last visited Oct. 15, 2008) ("Sometimes victims are sold worthless 'kits,' costing several thousand dollars, which are nothing more than standard forms that may or may not be valid, as laws concerning living trusts vary from state to state."). For examples of such cases, see Foster, *supra* note 169, at 584–95. For some settlors, the price is even greater than a worthless trust. *See id.* at 585–95 (discussing and citing examples of living trust purchasers who become victims of identity theft and fraudulent investment schemes, "disqualified from Medicaid, burdened with unnecessary taxes, destitute, or worse–broken in body and spirit").

205. For example, "[a]n elderly resident of Sarasota County, Florida" purchased a revocable trust from an out-of-state trust mill. *Death Planning Made Difficult: The Danger of Living Trust Scams: Hearing Before the S. Spec. Comm. on Aging*, 106th Cong. pt. II.G. (2000) (testimony of Paul F. Hancock, Deputy Attorney General for South Florida), *available at* http://aging.senate.gov/events/hr53ph.pdf. Unfortunately, the trust turned out to be invalid under Florida law. *Id.* As a result, after the purchaser's death, her estate had to go through "full probate administration." *Id.* Moreover, because she did not leave a will, her property passed to her intestate heirs. *Id.*

Preneed contracts have an equally checkered past and present.[206] Unscrupulous funeral home operators and their unlicensed salespeople[207] promise their victim the "peace of mind"[208] that comes with planning her own funeral.[209] Under a "pay now-die later"[210] scheme, the consumer enters into a contract with a funeral home years—even decades—before her death, specifying how and by whom her remains are to be handled.[211] Unfortunately, these contracts turn out to be risky propositions. Reports abound of funeral service directors going bankrupt,[212] embezzling prepaid funeral accounts,[213] or refusing to perform as directed in the decedent's contract.[214] Once

206. For a discussion of the long-standing problems with fraud and misrepresentation in the preneed contract context, see HUGH Y. BERNARD, THE LAW OF DEATH AND DISPOSAL OF THE DEAD 61–67 (2d ed. 1979). For more recent analyses of funeral industry abuses and state regulatory efforts, see generally Judith A. Frank, *Preneed Funeral Plans: The Case for Uniformity*, 4 ELDER L.J. 1 (1996); Murphy, *supra* note 90, at 387–96; Ashley Hunt, Note, *There Is a New Trend of Corporate "Death Care:" Let the Buyer Beware*, 27 NOVA L. REV. 449 (2003).

207. *See* Anthony Gottschlich, *State Board Fines 2 Area Funeral Homes; Newcomer, Routsong Charged with Letting Nonlicensed People Sell Pre-need Contracts*, DAYTON DAILY NEWS, June 20, 2007, at A4 (reporting that the "Ohio Board of Embalmers and Funeral Directors . . . charged two local funeral homes with violating state funeral laws that prohibit anyone but licensed funeral directors from selling funeral services").

208. Williams, *supra* note 183.

209. Another supposed "benefit [of preneed contracts] is that you're buying tomorrow's service at today's cost . . . . The money is put in a bank trust or an insurance company trust that will allow it to grow to keep ahead of the inflationary spirals." Jason Kelly, *"Paying Respects;" From Corporate Buyouts to Cremation, the Funeral Industry is Changing the Way It Does Business*, SOUTH BEND TRIB., Jan. 19, 1997, at F1 (quoting Gary Eastlund, president of the Indiana Funeral Directors Association). According to AARP, "32 percent of older Americans had prepaid their funeral expenses . . . . This fact translates, even in a conservative estimate, into more than $40 billion in 'pre-need' funeral accounts." Nancy J. Herin, *Greed Turns "Pre-Needs" into Problem*, BALT. SUN, Jan. 29, 2007, at 11A.

210. Frank, *supra* note 206, at 5; Shelby Oppel, *Funeral Home Giants Seek Cash*, ST. PETERSBURG TIMES, Sept. 23, 2000, at 1B ("Industry insiders call the accounts 'pay now, die later.' ").

211. BERNARD, *supra* note 206, at 63 (explaining that "preneed plans" have that name because the purchaser pays "sums of money . . . years or months or even decades in advance of death, the time of 'need' "); Frank, *supra* note 206, at 5–6 (discussing use of preneed contracts to "customize fully [the consumer's] funeral").

212. *See, e.g.*, *Idaho Funeral Home Bankrupt, Preneed Funds Missing*, 8 DEATH CARE BUS. ADVISOR, July 10, 2003 (reporting that an Idaho funeral home owner declared bankruptcy and "closed the business without funds being set aside in preneed trust accounts").

213. *See, e.g.*, Daniel Connolly, *Consumer Groups Advise Against Prepaid Funeral Policies*, COM. APPEAL (Memphis), Feb. 6, 2007 (discussing high profile cases of "massive" embezzlement of prepaid funeral funds in Hawaii, Maryland, Michigan, Ohio, and Tennessee); Matthew Dolan, *Customers Fear Loss of Funeral Prepayments; Thousands Prepaid for Md. Funerals Could Be Lost*, BALT. SUN, Jan. 27, 2007, at 1A (discussing the embezzlement of prepaid funeral accounts by Stella Funeral Home's owner and employees).

214. *See, e.g.*, Herin, *supra* note 209, at 11A (quoting the President of the Funeral Consumers Alliance of Maryland and Environs that "survivors might be told they must spend more to complete the funeral transaction, though they thought everything had been paid for" and

again, a decedent's lifetime efforts to avoid the family paradigm may fail. The very person she hoped to avoid—her closest family member—may end up controlling the disposition of her remains.

Even the most flawlessly drafted and executed will, will substitute, proxy agreement, or contract may prove equally ineffective to bypass the family paradigm. As proponents themselves acknowledge, a decedent's family survivors can challenge the validity of such documents on grounds of mental incapacity, undue influence, duress, or fraud.[215] "The result of this is often to alter the best-laid plans of testators, even when those plans are expressly indicated in a will."[216] Donative freedom may ultimately prove illusory for individuals who choose to leave their assets or remains to those closest by affective rather than blood or marital ties.[217] Here too, the family paradigm may well defeat a decedent's wishes.

2. Alternative Dispute Resolution Techniques

Under this final approach, reformers have concluded that permitting excluded testators and their survivors "to opt out of a legal forum that is often biased against them" would also sufficiently avoid the family paradigm.[218] Trusts and estates scholars have proposed a variety of alternative dispute resolution ("ADR") techniques to protect

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citing the example of a woman who "complain[ed] that the owner of a local mortuary, with whom her father had entered into a pre-need agreement, had stated upon the father's death, 'Prices have gone up. You owe us another $1,400' "); Jim Miller, *Savvy Senior; Go Ahead and Plan It; It's Your Funeral*, CHARLESTON GAZETTE, Mar. 22, 2004, at 2D (warning that due to inflation in future funeral costs funeral homes may "substitute[] . . . less expensive merchandise" than specified in the preneed contract).

215. *See, e.g.*, Horan, *supra* note 64, at 442 (stating that "decedent's relatives who do not support a same-sex partnership may be more inclined to challenge the decedent's wishes on the grounds of undue influence or lack of mental capacity so that they can impose their own wishes"). For extended discussion of mental capacity and undue influence challenges to wills, contract to devise, and will substitutes, see Foster, *supra* note 18, at 210–19. It should be noted, however, that will substitutes are less susceptible than wills to challenge on such grounds. *See* Foster, *supra* note 169, at 571–72 & nn.107–10 (discussing the difficulties of challenging revocable inter vivos trusts).

216. Horan, *supra* note 64, at 442.

217. Foster, *supra* note 18, at 209 ("Donative freedom . . . can become a 'myth' when a testator attempts to leave property to those closest by affective rather than by blood or marital ties.") (citing Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 235 (1996)). For a review of the literature criticizing the use of mental capacity, undue influence, and fraud doctrines to invalidate wills that deviate from traditional family norms, see Foster, *supra* note 18, at 235–39.

218. Spitko, *supra* note 171, at 314.

wills that deviate from traditional family norms.[219] Professor Spitko, for example, has called for "testator-compelled arbitration,"[220] a scheme that would allow a testator to direct in her will that any future will contest be adjudicated by an arbitrator of her choice.[221]

Other ADR proponents focus instead on mediation. They argue that mediation responds to the full range of issues—both legal and nonlegal—presented by nonconforming wills. They emphasize that mediation addresses a common problem with such wills: survivors' "competing notions of fairness."[222] They also cite mediation's advantages: reducing administrative and financial costs;[223] promoting privacy and confidentiality;[224] "repair[ing], maintain[ing], or improv[ing]"[225] relationships among contending parties; and empowering parties who feel "marginalized in the judicial process"[226] to fashion their own solution to a dispute.[227]

Reformers in the mortal remains context, in contrast, have largely ignored ADR techniques as a response to the family paradigm. The few commentators that have recommended ADR have generally not focused on the possible use of such techniques to bypass family default rules. For example, Theresa Ellis has identified mediation as an "effective method to resolve . . . burial disagreements"[228] but in only one type of case: disputes between divorced parents of a deceased

219. For an extended discussion of procedural mechanisms, including ADR, that reformers have proposed to respond to the family paradigm in inheritance law, see Foster, *supra* note 18, at 235–40.

220. Spitko, *supra* note 171, at 276–77.

221. *Id.*

222. Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 418 (1997). Reformers "contend that fairness concerns arise particularly often in cases where a testator departed from 'natural' will distribution patterns to recognize special services provided by one family member or relationships outside traditional family boundaries." Foster, *supra* note 18, at 238.

223. *See, e.g.*, Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 198 (1999) (noting that mediation tends to be quicker and financially less costly than formal litigation); Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601, 642–43 (2000).

224. Gary, *supra* note 222, at 424 (stating that mediation enhances "privacy and confidentiality").

225. *Id.* at 428.

226. Chester, *supra* note 223, at 198 (summarizing the findings of a Massachusetts Supreme Judicial Court Report on Alternative Dispute Resolution).

227. Gary, *supra* note 222, at 429 ("Mediation allows parties to craft their own solution to a dispute.").

228. Ellis, *supra* note 114, at 299.

child.[229] One notable exception is Brian Josias, who has explicitly recognized that family default rules "do[] not necessarily account for all of the parties who may be involved in a dispute over disposition of the body."[230] He recommends ADR techniques "that combine speed with an ability to entertain viewpoints from many diverse parties."[231] According to Josias, ADR can address the concerns of those ignored by the family paradigm, including the decedent, her nonfamily survivors, religious organizations, funeral organizations, the state, and even the decedent's pets.[232]

In the end, this final bypassing approach also fails to offer a comprehensive response to the family paradigm. In the inheritance context, ADR proponents address only one area where that paradigm distorts disposition of a decedent's property: its adverse impact on nonconforming wills.[233] In the mortal remains context, even the principal ADR advocate, Brian Josias, recognizes the limitations of these techniques. He acknowledges, for example, that because mediation is nonbinding it may not provide the finality required in resolving disputes over disposition of a decedent's remains.[234] Ironically, "[t]he very ability of mediation to entertain multiple parties also means that some parties may not be included in a voluntary mediation."[235]

As the next Part will show, the most promising response to the family paradigm lies within the very system ADR proponents have rejected: the traditional adjudication process.

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229. Theresa Ellis also recommends the use of mediation for life-support disagreements between such parents. *Id.*

230. Brian L. Josias, Note, *Burying the Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies*, 79 NOTRE DAME L. REV. 1141, 1152 (2004).

231. *Id.* at 1143.

232. *Id.* at 1142, 1152. Josias uses Ted Willams's dog "Slugger" as an example of a pet whose "interests" should be "take[n] into account." *Id.* at 1152–53. He quotes Williams's "longtime friend and business partner, Arthur 'Buzz' Hamon" as saying: " 'Ted told me several times that he wanted to be cremated and have his ashes, and the ashes of his dog Slugger, spread off the Florida Keys.' " *Id.* at 1153 n.42.

233. *See* Foster, *supra* note 18, at 239–40 (providing a critical analysis of reform proposals).

234. Josias, *supra* note 230, at 1179.

235. *Id.* Josias also emphasizes limitations in arbitration as a method for resolving burial disputes. *Id.* He states "[a]rbitration may offer some benefits in resolving burial disputes, particularly where there is a will that must be interpreted and enforced to honor the wishes of the deceased." *Id.* However, he concludes that in cases where no will exists, arbitration will not be as effective as mediation because "the goal of resolving conflict would be in seeking an agreement between the surviving relatives." *Id.*

IV. TRANSCENDING THE FAMILY PARADIGM: INDIVIDUALIZED JUSTICE IN DISPUTES OVER DEAD BODIES

In her influential 1986 article *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*,[236] Professor Mary Ann Glendon presented a devastating critique of "well-intentioned"[237] proposals to expand judicial discretion over distribution of decedents' estates. She argued that, unlike current "fixed rules" of inheritance,[238] a discretionary scheme would "promote[] intrafamily litigation,"[239] depletion of estates, uncertainty, and judicial intrusions on testamentary intent.[240] Professor Glendon is not alone. Even though countries as diverse as China[241] and Great Britain[242] have successfully employed discretionary schemes,[243] today the overwhelming "weight of opinion in [the United States] opposes"[244] adoption of this more flexible inheritance model. Professors Langbein and Waggoner have proclaimed that a discretionary scheme would be "frightening"[245] in the American context. They and other leading trusts and estates scholars have presented a parade of horribles—a discretionary inheritance scheme would "promote litigation,"[246] increase

236. Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986).

237. *Id.* at 1186.

238. *Id.* at 1165.

239. *Id.* at 1191.

240. *Id.* at 1186–91.

241. For extended discussion of the Chinese experience, see Foster, *Linking Support and Inheritance*, *supra* note 20; Foster, *Towards a Behavior-Based Model*, *supra* note 20.

242. For a sampling of the literature, see generally W.D. MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960); Suman Naresh, *Dependents' Applications Under the Inheritance (Provision for Family and Dependents) Act 1975*, 96 LAW Q. REV. 534 (1980); Helene S. Shapo, *"A Tale of Two Systems": Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707 (1993); Richard R. Schaul-Yoder, Note, *British Inheritance Legislation: Discretionary Distribution at Death*, 8 B.C. INT'L & COMP. L. REV. 205 (1985).

243. For a review of the literature on the discretionary family maintenance model adopted by Great Britain and other Commonwealth countries, see Foster, *Linking Support and Inheritance*, *supra* note 20, at 1209–17. Professor Chester has called particular attention to British Columbia's successful implementation of a discretionary family maintenance scheme. *See generally* Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1; Ronald Chester, *Should American Children Be Protected Against Disinheritance?*, 32 REAL PROP. PROB. & TR. J. 405 (1997).

244. WILLS, TRUSTS, AND ESTATES 481 (Jesse Dukeminier & Stanley M. Johanson eds., 5th ed. 1995).

245. John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 314 (1987).

246. Verner F. Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession*, 10 GA. L. REV. 447, 462–63 (1976). *See* Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a*

"information and administrative costs,"[247] delay distribution of estates,[248] "impede[] predictability"[249] and certainty,[250] threaten family harmony and privacy,[251] and undermine the cherished American ideal of testamentary freedom.[252]

As this Part will show, for over a century, a large number of courts have done in the mortal remains context precisely what trusts and estates scholars have rejected. In resolving disputes over dead bodies, these courts have exercised a "benevolent discretion,"[253] "each . . . case dealt with separately and in accordance with its own circumstances."[254] Indeed, in marked contrast to Professor Glendon's insistence on fixed rules of inheritance, a 1911 New Jersey judge pronounced "embarrassing" the very notion that there are "hard and

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Solution, 49 U. MIAMI L. REV. 567, 581 (1995) ("One concern with the testator's family maintenance approach is that its adoption would likely lead to increased litigation . . . ."). Professor Gary concludes, however, that although a discretionary scheme "likely will lead to increased litigation . . . given the state of today's families, some degree of discretion is necessary." Gary, *supra* note 32, at 71.

247. Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12 n.42 (1992). *See* J. Thomas Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, 38 CASE W. RES. L. REV. 223, 231 (1987) (stating that the discretionary English family maintenance "system probably would complicate the administration of many decedents' estates"); Spitko, *An Accrual/Multi-Factor Approach*, *supra* note 35, at 284–85 (stating that "an open-ended inquiry intestacy scheme . . . would be greatly more expensive than is administration under extant American intestacy schemes"); Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 726–29 (1992) (stating that one reason the drafters of the 1990 Uniform Probate Code rejected a discretionary equitable distribution scheme for marital property rights was the difficulty of reconciling the "multitude of [property] regimes" followed by the various states).

248. *See* BRASHIER, *supra* note 30, at 25 (criticizing the family maintenance system, in part, as "time-consuming" because of its "individualized inquiries"); Spitko, *An Accrual/Multi-Factor Approach*, *supra* note 35, at 284–85 (stating that an "open-ended inquiry intestacy scheme . . . would be more time-consuming").

249. Langbein & Waggoner, *supra* note 245, at 314.

250. *See* WILLS, TRUSTS, AND ESTATES, *supra* note 244, at 481 (emphasizing that discretionary schemes create "uncertainty [, which] would make estate planning much more difficult"); Gary, *supra* note 32, at 69 (stating that the "testator's family maintenance . . . idea has never caught hold here, however, perhaps because of a desire for certainty"); Spitko, *An Accrual/Multi-Factor Approach*, *supra* note 35, at 284–89 (criticizing the discretionary approach for creating uncertainty); Waggoner, *supra* note 247, at 726–29 (discussing the uncertainty in discretionary equitable distribution schemes).

251. *See* Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 131 (1994) (stating that the discretionary family maintenance model would encourage claimants to air "an enormous amount of a family's dirty laundry").

252. *See* BRASHIER, *supra* note 30, at 27 ("Americans are unlikely to welcome . . . the system's substantial incursion upon testamentary freedom."); Brashier, *supra* note 251, at 131–32 (stating that freedom of testation "withers away under the system of testator's family maintenance").

253. Yome v. Gorman, 152 N.E. 126, 128 (N.Y. 1926).

254. De Festetics v. De Festetics, 81 A. 741, 742 (N.J. Ch. 1911).

fast rules . . . binding strictly on the conscience of the court because the court might find its duty to lie entirely beyond their scope."[255]

This flexible, individualized approach to mortal remains disputes transcends the family paradigm. In the interests of justice, courts have rejected the claims of even the family member the default rules most privilege: the decedent's surviving spouse.[256] A 1942 Arkansas case[257] is illustrative. The court considered whether Inez Nelson Cabe's husband, Jim Cabe, or her mother, Grace Thompson, was entitled to custody of her remains.[258] The court acknowledged the "general rule" that the surviving spouse has the "primary and paramount right" to possession of a deceased spouse's remains.[259] Nonetheless, the court departed from this rule and awarded custody to the decedent's mother rather than husband because of the particular facts of the case:

> During [Inez Cabe's] last illness she was in her mother's home and was administered to and provided for by her mother. During all of her illness, which resulted in her death, her husband manifested not the slightest interest in his wife's welfare, made no inquiry or provisions for her, did not visit her and in fact there was no evidence in this record that he even attended the funeral.[260]

Had this case involved disposition of Inez Cabe's assets rather than her remains, the outcome would have been very different. In most jurisdictions, despite his reprehensible conduct, Jim Cabe would have inherited his wife's estate.[261] A court would have no flexibility to adjust inheritance rights to reflect a mother's care and a husband's neglect. This problem is surmountable, however.

In earlier work, I explored possible alternatives to the family paradigm of inheritance law.[262] I concluded that two approaches offered the greatest promise: what I called the *decedent intent approach*[263] and the *actual relationship approach*.[264] The decedent intent approach would base inheritance rights on the decedent's own definition of the "natural objects" of her bounty—family and nonfamily

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255. *Id.*

256. *See supra* note 89 and accompanying text.

257. Teasley v. Thompson, 165 S.W.2d 940 (Ark. 1942).

258. *Id.* at 941.

259. *Id.*

260. *Id.*

261. This assumes that Inez Cabe died intestate. The court opinion does not indicate whether or not she left a valid will. *See supra* notes 49–56 and accompanying text (discussing and citing literature on the failure of status-based inheritance rules to penalize wrongdoers for misconduct toward the decedent).

262. Foster, *supra* note 18, at pt. III.B.

263. *Id.* at 257–68.

264. *Id.* at 268–71.

alike.[265] This approach would consider the full range of decedents' expressions of their dispositive preferences, from formally executed wills to oral statements of intent.[266] The actual relationship approach, in contrast, would base inheritance rights on the decedent's actual relationships with others in her life.[267] Such relationships would include relationships involving support,[268] financial sharing,[269] legal obligations or decisionmaking authority for the other party,[270] or a decedent's "attitude of generosity toward a person or organization that would likely have continued had death not intervened."[271] An actual relationship approach would also adopt a behavior-based approach.[272] It would explicitly consider survivors' treatment of the decedent during her lifetime.

In litigation over dead bodies, both the decedent intent approach and the actual relationship approach are already a reality. This historical experience should inspire reformers in the inheritance as well as the mortal remains field to explore new directions that lie outside the family paradigm.

A. The Decedent Intent Approach

Donative freedom is supposed to be the guiding principle of American inheritance law. Indeed, courts invoke testator intent regularly as their "lodestar."[273] Yet, in practice, many of those same courts impede rather than effectuate intent. Courts routinely deny probate to documents that they acknowledge represent a testator's wishes.[274] Even the most minor deviations from will execution

265. *Id.* at 257.

266. *Id.* at 257–68.

267. *Id.* at 268.

268. *Id.* at 269.

269. *Id.*

270. *Id.* at 270.

271. *Id.*

272. *See supra* notes 58–59 and accompanying text (discussing a behavior-based model of inheritance).

273. *See, e.g.*, Lounden v. Bollam, 258 S.W. 440, 444 (Mo. 1924) (stating that "the testator's intention is the lodestar by which the courts are to be guided in determining the meaning of a will"); *In re* Estate of Janney, 446 A.2d 1265, 1266 (Pa. 1982) ("It is settled in this Commonwealth, as in New Jersey, that the intention of the testator is of primary importance, the lodestar, cornerstone, cardinal rule.").

274. *See* Mann, *supra* note 165, at 1036 ("Courts have routinely invalidated wills for minor defects in form even in uncontested cases and sometimes even while conceding–always ruefully, of course–that the document clearly represents the wishes and intent of the testator.").

formalities may defeat testamentary intent.[275] Similar problems exist in judicial interpretation and construction of wills. Courts adopt an approach that one commentator calls "just plain strange."[276] Rather than admitting evidence of what the testator actually meant by the words she used in her will, courts determine testamentary intent solely from the "everyday and ordinary" meaning of those words.[277] When confronted with gaps in wills, courts once again ignore the actual intent of the testator. Instead of considering what that specific testator would have wanted under the circumstance she failed to anticipate, courts address gaps "on the basis of a presumed intent that bears no necessary relationship to the individual case at hand."[278] As for intestacy cases, even the most irrefutable evidence of an individual's dispositive preferences and relationships with survivors is irrelevant.[279] Courts mechanically apply intestacy laws and distribute estates according to the legislature's definition of the "normal desires"[280] of decedents.

In resolving disputes over dead bodies, courts have also proclaimed testator intent sacrosanct.[281] An 1895 Iowa case summed up this view best: "It always has been, and will ever continue to be, the duty of courts to see to it that the expressed wish of one, as to his final resting place, shall, so far as it is possible, be carried out."[282]

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275. Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 49 (1985) (discussing cases in which courts invalidated wills for execution defects even though "there was little or no question that the testator had intended the instrument to be a will"). For an example of such a case, see *supra* note 193 (discussing *Stevens v. Casdorph*).

276. Jane B. Baron, *Essay: Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 663 (1992).

277. *In re* Marine Midland Bank, N.A., 547 N.E.2d 1152, 1153–54 (N.Y. 1989) ("Courts construing donative instruments are governed by a threshold axiom: a testator's intent, as ascertained 'from the words used in the will . . . according to their everyday and ordinary meaning,' reigns supreme.") (citations omitted).

278. Mann, *supra* note 165, at 1053.

279. Foster, *supra* note 18, at 206–09, 263 (discussing intestacy law).

280. UNIF. PROBATE CODE art. II, pt. 1 gen. cmt. (1969) (amended 1990).

281. *See, e.g.*, Cottingham v. McKee, 821 So. 2d 169, 172 (Ala. 2001) ("[I]f a testator unambiguously expresses in his will how his body is to be disposed of, it is incumbent upon the executor and the court to honor the testate's wishes."); Wood v. Butterworth, 118 P. 212, 214 (Wash. 1911) (stating that "the wishes of the deceased person, if ascertained, should be given controlling force").

282. Thompson v. Deeds, 61 N.W. 842, 843 (Iowa 1895). The court explained:

> In one view, it is true it may not matter much where we rest after we are dead; and yet there has always existed, in every person, a feeling that leads him to wish that after his death his body shall repose beside those he loved in life. Call it sentiment, yet it is a sentiment and belief which the living should know will be respected after they are gone.

Id.

There is a striking difference in the mortal remains context, however. Unlike their counterparts in inheritance disputes, these courts have given real content to their stated commitment to effectuate testator intent. Courts have consistently enforced an individual's wishes concerning disposition of her remains regardless of whether she expressed those wishes in a formal instrument or "parol or non-formal disposition[]."[283]

Respect for a decedent's testamentary wishes regarding her remains has a long history. Indeed, as American courts have emphasized, that history extends as far back as ancient Rome.[284] In the nineteenth century, American courts broke with English common law precedent and expressly recognized "the right of a person to provide by will for the disposition of his body."[285] Testamentary directions have often trumped family default rules. For example, a New York testator, Benjamin Eichner, provided in his will that he wanted his executors to cremate his body, preserve his ashes "in a suitable receptacle," and inter his ashes in a Brooklyn cemetery "in as close proximity to the graves of [his] departed beloved parents as is possible."[286] After his death, Eichner's next of kin objected to cremation.[287] The court ruled that the relatives' opposition was "without legal support or any other force"[288] because "the wishes of a decedent in respect of the disposal of his remains are paramount to all other considerations."[289] The court warned Eichner's executors that if

283. *In re* Estate of Johnson, 7 N.Y.S.2d 81, 83 (N.Y. Sur. Ct. 1938).

284. *See, e.g., id.* at 87–89 (reviewing Roman civil law). *See also* JACKSON, *supra* note 175, at 42 (" 'The ancient Greeks and Romans were particular to carry out the directions of the deceased respecting the disposition of his body.' " (quoting John H. Corwin, *Burial Law*, 39 ALB. L.J. 196, 197 (1889))).

285. *In re* Riegle's Estate, 32 N.Y.S. 168, 171 (N.Y. Sur. Ct. 1894). English common law precedent held that because "there can be no property in a corpse," an individual could not make a valid and binding disposition of her body by will. *In re* Estate of Henderson, 57 P.2d 212, 214 (Cal. Ct. App. 1936). Although a few courts continued to follow the English rule, *see, e.g.*, Enos v. Snyder, 63 P. 170, 171 (Cal. 1900), "the clear trend of American authority [was] contrary to the strict, ancient English rule." *Estate of Henderson*, 57 P.2d at 214. Even under the more expansive view, this testamentary right is not absolute, however. *See In re* Estate of Moyer, 577 P.2d 108, 110 (Utah 1978) (stating that a person's disposition of his body "should be recognized and held to be binding after his death, so long as that is done within the limits of reason and decency as related to the accepted customs of mankind" and emphasizing that "this right should [not] be regarded as an absolute property right by which a person could give absurd or preposterous directions that would require extravagant waste of useful property or resources, or be offensive to the normal sensibilities of society in respect for the dead").

286. *In re* Estate of Eichner, 18 N.Y.S.2d 573, 573 (N.Y. Sur. Ct. 1940).

287. *Id.*

288. *Id.*

289. *Id.*

they failed to comply with the will's instructions, they faced criminal prosecution.[290]

Courts have also recognized decidedly less formal documents. For instance, in *Fidelity Union Trust Co. v. Heller*,[291] a New Jersey court ascertained the decedent's wishes regarding his final resting place from "correspondence in his files" relating to his plans to erect a mausoleum in Newark's Mount Pleasant Cemetery.[292] Another New Jersey case, *Bruning v. Eckman Funeral Home*,[293] featured a "written directive"[294] that gave the decedent's "beloved"[295] companion of twenty-three years rather than his estranged wife control over his "final burial."[296] The court ruled that this document was as valid an expression of decedent intent as a formally executed will.[297]

In marked contrast with inheritance cases, courts have upheld oral statements of a decedent's wishes if clear and convincing evidence of those wishes exists.[298] Consider, for example, the sad case of Dr.

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290. *Id. See also* Kasmer v. Limner, 697 So. 2d 220, 221 & n.1 (Fla. Dist. Ct. App. 1997) ("remind[ing]" personal representatives who objected on religious grounds to cremating the testator that "their duty . . . is to administer this estate in accordance with the terms of Mr. Limner's will" and "[if they] cannot act in compliance with the will because of their religious views, they are free to resign or ask the probate court to appoint suitable individuals who can carry out the decedent's wishes").

291. Fidelity Union Trust Co. v. Heller, 84 A.2d 485 (N.J. Super. Ct. Ch. Div. 1951).

292. *Id.* at 486. This correspondence showed that Paul E. Heller "negotiated for the erection of the mausoleum and procured elaborate sketches, blueprints and estimates, but material shortages during the war years prevented him from completing his project." *Id.*

293. Bruning v. Eckman Funeral Home, 693 A.2d 164 (N.J. Super. Ct. App. Div. 1997).

294. *Id.* at 165.

295. *Id.* "During the time that Helstowski and decedent lived together, she took care of him when he was ill and tended to his personal business affairs." *Id.*

296. *Id.*

297. *Id.* The court remanded the case, however, to determine whether the directive expressed the decedent's intent. *Id.* at 168. Some courts have even determined decedent intent from revoked wills. *See, e.g., In re* Salomon, 766 N.Y.S.2d 294, 296 (N.Y. Sup. Ct. 2003) (stating that "[o]f particular significance to the intent of the decedent regarding to the disposition of his remains is a document written in Hebrew which purports to be a prior will that had been revoked" and concluding from a translated "portion of the document which referred to the expense of a headstone . . . that the decedent anticipated an interment upon his death").

298. *See In re* Estate of Scheck, 14 N.Y.S.2d 946, 952 (N.Y. Sur. Ct. 1939) (requiring "a clear and convincing demonstration by competent and credible testimony"). Under this standard, courts have not enforced statements "expressed during life [that] may have been declared casually or lightly." Yome v. Gorman, 152 N.E. 126, 129 (N.Y. 1926). Thus, for example, a Nebraska court held that a statement made by a twenty-one-year-old decedent when he was nine or ten years of age "f[ell] far short of being a dying request, or of proving a dying wish." McEntee v. Bonacum, 92 N.W. 633, 634 (Neb. 1902). Courts have also required that oral statements be made by a mentally competent individual. *See* Rosenblum v. New Mt. Sinai Cemetery Ass'n, 481 S.W.2d 593, 595 (Mo. Ct. App. 1972) (refusing to enforce a decedent's oral statements that he wanted to be buried in St. Louis because when he made those statements he suffered from a "mental condition, brought about by high blood pressure, induced by arteriosclerosis and the effects of terminal cancer, and . . . differences in his personality and attitude toward his

Joseph P. Wales, whose wife "had alienated [his] affection and regard . . . , and had also destroyed his happiness and peace of mind, by her intemperate habits and mode of living."[299] For the final two years of his life, Dr. Wales was "without society or companionship in his home and frequently turned to his sister . . . for solace and companionship."[300] During this period, he told his sister and a funeral home director that he wanted to be buried in the Wales family vault "and not with his wife when she, of course, should die."[301] The court honored these wishes despite strong opposition from Dr. Wales's widow.[302]

Courts have even allowed subsequent oral statements to alter or revoke burial instructions in a validly executed will. In mortal remains cases, the courts' principal goal is "ascertainment of the latest expression of wish by the testator on the subject."[303] A Florida case is illustrative. In 1992, Hilliard Cohen executed a will, which directed that he be buried in a traditional Jewish burial in his family's plot in New York.[304] The Cohen family plot was located in a "Jewish restricted area."[305] In 1998, Cohen and his wife, Margaret, who was not Jewish,[306] moved to Florida.[307] During the final years before his death, Cohen informed Margaret, his daughter, and his doctor that he wanted to be buried in Florida "where his wife of forty years could also rest upon her death."[308] The court ruled that the burial instructions in Cohen's will were not binding because clear and convincing evidence existed that Cohen had "a change in intent."[309]

Some courts have been so committed to identifying and effectuating decedent intent that they have not confined their inquiry to written and oral expressions of that intent. Instead, they have considered the individual decedent's acts, state of mind, religious beliefs, and "intensity of . . . feelings."[310] Consider, for example, a 1924

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immediate family between the many years of happy life with wife and daughter and the last months of his life"). The court instead awarded custody of the decedent's body to his widow for burial in Evansville, Illinois. *Id.* at 595–96.

299. Wales v. Wales, 190 A. 109, 111 (Del. Ch. 1936).

300. *Id.*

301. *Id.*

302. *Id.* at 110–11.

303. *Estate of Scheck*, 14 N.Y.S.2d at 952.

304. Cohen v. Cohen, 896 So. 2d 950, 952 (Fla. Dist. Ct. App. 2005).

305. *Id.*

306. *Id.* at 951.

307. *Id.*

308. *Id.* at 955.

309. *Id.*

310. Yome v. Gorman, 152 N.E. 126, 129 (N.Y. 1926).

Minnesota case.[311] Two years before his death, Joseph Soklowski, a Roman Catholic "in good standing,"[312] organized the Sacred Heart of Jesus Polish National Catholic Church, a "schismatic church" that followed Catholic doctrines but "d[id] not recognize the Pope as its head."[313] On numerous occasions he expressed his "strong desire"[314] to be buried in that church's cemetery.[315] On his deathbed, however, Soklowksi called for a Roman Catholic priest to administer the last rites.[316] The court concluded that this act was clear evidence of Soklowski's final wishes regarding disposition of his remains:

> [B]y Joseph Soklowski's calling for the priest of the Roman Catholic Church to administer the last sacrament and receiving it, he renounced all previously expressed desires to be buried in the cemetery of the schismatic church he had organized and plainly announced a final desire to be buried as a Roman Catholic in ground consecrated for that purpose according to the practice of that religious faith.[317]

The court's resolution makes sense. While calling for a Roman Catholic priest might have been consistent with Soklowski's beliefs to some extent, his actions raised doubts about the depth of his rejection of Roman Catholic practice. Approaches that required an express declaration of intent would necessarily fail to deliver individualized justice in this instance.

As the next Section will show, courts have adopted an equally flexible, individualized approach in evaluating decedents' relationships with claimants.

B. The Actual Relationship Approach

In resolving disputes over dead bodies, courts have a long tradition of looking beyond family status to consider the actual relationships between decedents and their survivors. The reasons for this different tradition are not apparent. Humanistic impulses, largely unfettered by economic considerations, may simply be stronger in the mortal remains context. Religious, cultural, and moral beliefs may play a greater role. But, whatever the reason, as a Pennsylvania judge proclaimed, "In cases involving burial rights, the relationships

311. Sacred Heart of Jesus Polish Nat'l Catholic Church v. Soklowski, 199 N.W. 81 (Minn. 1924).

312. *Id.* at 83.

313. *Id.* at 81, 83.

314. *Id.* at 82.

315. *Id.*

316. *Id.* at 82–83.

317. *Id.* at 83.

between the parties and decedent play the dominant role . . . ."[318] The New Jersey case of *Felipe v. Vega*[319] illustrates this key divergence between approaches to dispositions of decedents' assets and remains.

In 1987, Edilberto Vega was killed in an automobile accident.[320] He died intestate, survived by his partner, Ana Felipe; their daughter, Sueheidi Alexis Vega; his father, Lino Vega; and "certain relatives."[321] Edilberto and Ana had lived together since 1982 but never married.[322] They had a "very close and loving relationship."[323] After Edilberto's death, Ana's love for her deceased partner "continue[d] to be strong and her desire to express her devotion to him [was] a substantial force in her life."[324] Had this case involved inheritance of Edilberto's estate, the court would have had to apply intestacy's rigid status-based rules. Ana was not Edilberto's legal spouse; hence, she would not qualify as his intestate heir.[325] Contrast this result with what in fact happened in the case.

Felipe v. Vega was a dispute between Ana and Edilberto's father, Lino, over where to bury Edilberto.[326] Because Edilberto had "expressed no preference"[327] regarding disposition of his remains, New Jersey's default rules governed. Just as in intestacy, these rules did not extend rights to Ana because she was not the "surviving spouse of the decedent."[328] Here, however, the judge was flexible enough to depart from the family paradigm-based default rules and recognize the actual relationship between Edilberto and Ana.[329] The judge ruled in favor of Ana as plaintiff, stating: "I see no reason why plaintiff's non-marital status alters any of the considerations already related.

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318. Pulaski v. Kyzer, 18 Pa. D. & C.3d 223, 226 (Pa. C.P. Ct. 1980).

319. Felipe v. Vega, 570 A.2d 1028 (N.J. Super. Ct. Ch. Div. 1989).

320. *Id.* at 1029.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 1031.

325. N.J. STAT. ANN. § 3B:5-3 (West 2008) (amended 2006 to give "domestic partner[s]," as well as "surviving spouse[s]," an intestate share).

326. Lino wanted his son buried in Mt. Holly, New Jersey near his home in the same cemetery where he had buried another son. *Felipe*, 570 A.2d at 1029. Unfortunately, this cemetery was located one hour away from Ana's home. *Id.* Ana did not drive and no public transportation was available. *Id.* Thus, she wanted Edilberto buried in an Egg Harbor City, New Jersey cemetery "within walking distance of her home." *Id.*

327. *Id.* at 1031.

328. N.J. STAT. ANN. § 45:27-22(a)(1) (West 2008) (amended 2006 to give "surviving domestic partner[s]," as well as "surviving spouses" the right to control disposition).

329. The judge also considered the relationship between Edilberto and Lino. "In contrast, although Vega appears to be a loving and caring father, his contact with Edilberto during the last seven years of his life appears to have been minimal." *Felipe*, 570 A.2d at 1029.

Plaintiff's love and her devotional needs seem no less strong because of it."[330]

Unlike their counterparts in inheritance cases,[331] these courts have also used a comprehensive behavior-based approach in assigning rights to a decedent's remains. Courts evaluate the full range of claimants' conduct—good and bad—toward the decedent both during her lifetime and after her death to determine if the claimant is entitled to control the decedent's remains. In a 1925 Pennsylvania case, the court confronted an "unseemly quarrel" between a daughter, Annie, and two sons, Henry and Allie, "over disposition of the dead body of their father," Thomas A. Gwyn.[332] Under family default rules, the three children had equal rights to custody of their father's remains because they were each his next of "kin of the same degree of relationship."[333] Under a behavior-based scheme, however, only Annie deserved custody.

The court presented a detailed assessment of the three claimants' treatment of their father. Annie's behavior was exemplary. For the final seventeen years of Thomas's life, "she alone appear[ed] to have entertained sentiments of dutiful respect and affection for her father."[334] During his "last illness,"[335] Annie took her father into her home and cared for him.[336] She chose a "natural and fitting place to bury him": "his boyhood home" in Nashville next to his parents and other family members.[337] Henry's and Allie's behavior, in contrast, was "vengeful and unworthy."[338] "[F]or almost twenty years, [they] entertained no interest in, or friendship or affection for their father."[339] Both during Thomas's lifetime and after his death, they "nourished feelings of bitter and vengeful animosity toward him."[340] Unlike Annie, Henry and Allie sought to bury their father in Philadelphia, "in foreign ground and among strangers."[341] According to the court, the sons' choice of burial spot was motivated by a truly "malign" purpose: their "burning desire to wreak a posthumous

330. *Id.* at 1031.
331. *See supra* notes 51–59 and accompanying text.
332. Boyd v. Gwyn, 6 Pa. D. & C. 275, 275 (Pa. C.P. Ct. 1925).
333. *Id.* at 276.
334. *Id.* at 278.
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.* at 277.
340. *Id.*
341. *Id.*

vengeance upon him by preventing his ashes from resting peacefully beside his parents and among his own people."[342] Citing "every consideration of justice and equity," the court awarded custody of Thomas's body to Annie.[343]

Courts have gone still further. They have used a behavior-based approach in cases involving relatives of different degrees of kinship. They have rejected the claims of family members with "paramount rights" to dispose of a decedent's remains—the surviving spouse and children—in favor of more distant relatives who maintained a better relationship with the decedent.[344] In a recent Ohio case, for instance, the court ruled in favor of the decedent's parents rather than her husband despite "the universal rule of preference given the surviving spouse."[345] The court emphasized that the decedent had lived with, and was in the care of, her parents, who "bore a very close and loving relationship with their daughter."[346] As for her husband, he had a "tenuous relationship with his wife prior to her death."[347] After his wife's death, he displayed no "love, honor or respect"[348] for her. Instead, "his conduct was 'egregious, greedy, and a gross infringement of any form of decency.' "[349]

Similarly, a New York judge awarded custody of a decedent's body to his executors, mother, aunt, and cousin rather than to his daughter.[350] The judge acknowledged the daughter's "natural right . . . as the nearest next of kin to dictate the manner and place of her father's burial."[351] Nonetheless, he concluded from a detailed assessment of the record that the daughter had forfeited her right by her persistent failure to treat her father with "dutiful respect and affection."[352]

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342. *Id.* at 278.

343. *Id.*

344. *See* Feller v. Universal Funeral Chapel, Inc., 124 N.Y.S.2d 546, 551 (N.Y. Sup. Ct. 1953) (referring to a daughter's "paramount right as nearest next of kin"); *supra* note 89 and accompanying text (discussing the "paramount right . . . [of] the surviving spouse of the deceased").

345. Spanich v. Reichelderfer, 628 N.E.2d 102, 104 (Ohio Ct. App. 1993).

346. *Id.* at 107.

347. *Id.*

348. *Id.*

349. *Id.* (quoting trial court opinion).

350. Feller v. Universal Funeral Chapel, Inc., 124 N.Y.S.2d 546, 547, 551 (N.Y. Sup. Ct. 1953).

351. *Id.* at 551.

352. *Id.* The judge recognized that the estrangement between daughter and father was for "understandable" reasons. *Id.* at 550. The decedent had abandoned his wife and daughter for a "relationship with one other than his wife." *Id.* at 551. The record revealed that "normal parental and filial relations [did] not exist at the time of death." *Id.* The daughter refused even to see her

Finally, in a truly dramatic departure from inheritance law and practice, courts have recognized in mortal remains cases that a decedent's nearest and dearest may be those the family paradigm excludes altogether: individuals related by affection and support rather than blood.[353] The 1934 Texas case of *Burnett v. Surratt*[354] illustrates how courts can apply both approaches outlined above—the decedent intent approach and the actual relationship approach—to transcend the family paradigm.

After his death, W.A. Burnett's wife of "two or three years," Zudie, took possession of his body, sent it to a local funeral home, and ordered it interred in the Restland Memorial Cemetery in Dallas, Texas.[355] Burnett's executors sued to enjoin the interment, arguing that Burnett should be buried instead in St. Louis, Missouri.[356] The trial court granted a temporary injunction.[357] The appellate court affirmed this judgment,[358] applying both the decedent intent approach and the actual relationship approach.

First, the court ascertained Burnett's intent regarding disposition of his remains from his acts and oral statements. It noted that Burnett had buried his first wife in Calvary Cemetery in St. Louis, had purchased a grave next to hers, and had "erected at her grave a double tombstone; on one side of it was the name of his deceased wife, and on the other side a blank space left for his own name."[359] Moreover, the court cited the fact that Burnett had often

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father during the final months of his life. *Id.* at 548. Instead, she wrote nasty letters to him, accusing him of acting "like a cheap adolescent instead of a decent father," leading an "unnatural way of life," and failing to support her in the manner she deemed appropriate. *Id.* at 548–49. "She did not belong in the Bronx nor behind a Woolworth counter, as she wrote her father." *Id.* at 551.

353. *See supra* notes 45–48 and accompanying text (discussing the family paradigm); *see also* Pettigrew v. Pettigrew, 56 A. 878 (Pa. 1904) ("A more distant relative or even a friend not connected by ties of blood may have a superior right under exceptional circumstances to one nearer of kin . . . ."). For an example of such a case, see Koon v. Doan, 2 N.W.2d 878, 879 (Mich. 1942) (ruling that the friends with whom the decedent lived for eighteen years rather than his children should control disposition of his remains). The court contrasted the actual relationships of the parties toward the decedent. The decedent had "enjoyed the closest friendship with [the defendants]," his "real home . . . was with the defendants . . . [, and d]ecedent was almost a member of defendants' family for 18 years." *Id.* at 878–79. On the other hand, none of his children "saw or visited their father nor evidenced any interest in him for over a long period of years prior to his death." *Id.* at 878.

354. Burnett v. Surratt, 67 S.W.2d 1041 (Tex. Civ. App. 1934).

355. *Id.* at 1041–42.

356. *Id.* at 1041.

357. *Id.*

358. *Id.* at 1043.

359. *Id.* at 1042.

told his friends and associates that he wanted to be buried in St. Louis next to his first wife.[360]

Second, the court used the actual relationship approach to evaluate the parties' behavior. This approach only added further support for rejecting Zudie's claim. The record revealed that at the time of Burnett's death, he and Zudie were estranged and not living together.[361] The reason for the separation reportedly was that Zudie "had slapped him, abused him, . . . called him harsh and vile names, . . . 'left him, did not care for him, and . . . wouldn't come back and take care of him while he was sick.' "[362] Burnett's will repeated these allegations and expressly disinherited his wife.[363] The court emphasized that Burnett's executors, in contrast, were "a sister of his deceased wife, . . . a business associate, and . . . a friend of many years standing."[364] As a result, the court ruled in the executors' favor.[365] Its rationale was a classic statement of the discretionary, individualized scheme that inheritance reformers have condemned roundly—a scheme that gives courts the flexibility to depart from the family paradigm and base rights on the particular decedent's intent and actual relationships with survivors. As the *Burnett* court held:

> There is no established rule alike to all cases, but each must be considered on its own merits. The wishes of the surviving spouse, it may be said, should be and are generally considered by the courts as paramount, if the parties were living in the normal relations of marriage, but where, as in this case, an estrangement exists, the parties separated, and hard feelings are engendered by the survivor, or where the sentimental ties of human emotions are stronger to others than to the surviving spouse, the wishes of the decedent strongly impel a court of equity in holding that the decedent's wishes should prevail.[366]

V. CONCLUSION

Trusts and estates scholars have challenged the outdated family paradigm that dominates and distorts disposition of decedents' estates.[367] They have demonstrated that inheritance law's bias in favor of the "traditional" family excludes members of today's American families, rewards the unworthy, ignores the meritorious and needy,

360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.* at 1043.
366. *Id.* at 1042.
367. *See supra* Part II.A.

and denies decedents control over distribution of their own property.[368] Yet, those same scholars have rejected the approach that would best address the injustices of the family paradigm: an equitable, individualized scheme that would transcend the family paradigm and base inheritance rights on the particular individual's intent and actual relationships with her survivors.[369] Abstract notions of administrative convenience, efficiency, and certainty have triumphed over human needs and desires.

The mere mention of individualized justice conjures up images of lengthy proceedings, excessive expense, and judicial bias in favor of "traditional" family members.[370] As a result, legal scholars proposing reforms have felt obligated to replace one set of rules with another. In the process, they have invariably and sometimes unintentionally remained within the family paradigm. The examples, surveyed in this Article, of more than one hundred courts ignoring formal, family-based rules to deliver individualized justice make three contributions to the reform effort. First, these cases demonstrate, in the mortal remains context at least, a strongly felt need for individualized justice. Second, they suggest that fears of lengthy proceedings, excessive expense, and judicial bias are exaggerated. In disputes over dead bodies, courts usually delivered individualized justice within the constraints of judicial economy[371] and supported the claims of even those survivors most often excluded by the family paradigm: decedents' unmarried partners and nonrelated caregivers and friends.[372] Third, these cases show that judges' rationales for individualized decisions are generally more reasonable and convincing than are the rationales for rule-based decisions.[373]

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368. *See id.*

369. *See supra* notes 236–251 and accompanying text. There are a few notable exceptions, however. *See, e.g.*, Chester, *supra* note 243; Gaubatz, *supra* note 45.

370. Gary, *supra* note 42, at 681:

> Giving a court discretion to determine inheritance rights between family members raises concerns about the societal norms that may underlie a court's decision. A judge who disapproves of a family headed by gay or lesbian partners may be unlikely to find that a parent-child relationship existed, regardless of the evidence.

Professor Gary nonetheless concluded that "[a] limited degree of discretion and uncertainty is necessary to make the [intestacy] statute more responsive to more families." *Id.*

371. Notable exceptions exist, however. *See* Kester, *supra* note 64, at 589 (reporting that a Connecticut woman's "body remained frozen in storage, without a proper disposition, for at least five years while the various cases worked their way through the courts").

372. *See supra* Part IV.B.

373. *See, e.g.*, Blackstone v. Blackstone, 639 S.E.2d 369 (Ga. Ct. App. 2006) (holding that a father who abused and failed to support his son still inherited from his son under Georgia intestacy law). The court explained its decision:

This Article calls upon inheritance reformers to revisit the issue of individualized justice. It has shown that such a scheme is not in fact as "frightening" as its critics claim.[374] This Article has demonstrated that courts have a long tradition of applying just such a scheme in resolving disputes over dead bodies.[375] Ironically, the potential costs are even higher in the mortal remains context than in inheritance. As courts themselves have acknowledged, "the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property."[376] Indeed, "delay in the interment of dead bodies . . . is repugnant to the sentiment of humanity."[377] Nonetheless, for over a century, courts have concluded that individualized justice is more important than "fixed rules." In so doing, they offer a lesson for inheritance reformers as well.

This is not to say that courts will never make mistakes. The case that opened this Article—the battle over Anna Nicole Smith's body[378]—provides a prime example. Judge Larry Seidlin, after all, applied the family paradigm when he awarded custody of Anna Nicole's remains to her intestate heir, Dannielynn.[379] Note, however, that a Florida appellate court upheld Judge Seidlin's decision on family-neutral grounds.[380] Analogizing Judge Seidlin's approach to that of a "tipsy coachman"[381] who reaches the right destination by the wrong route, the court based its ruling on Anna Nicole's intent—her oral statements that she wanted to be buried in the Bahamas beside her beloved son—rather than her survivors' family status.[382]

In the end, the most compelling lesson from history may be the reminder that inheritance and mortal remains cases involve "[r]eal

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> We find no authority under Georgia law to warrant a holding that Cal Blackstone's right to recover as an heir under the laws of descent and distribution was forfeited by his treatment of and/or lack of support for Corey during his son's lifetime. While the type of cruel treatment alleged in this case may result in the loss of parental power and consequent loss of a parent's right to bring and recover the proceeds from a wrongful death action for the homicide of a child, Georgia's laws of descent and distribution are silent on the issue.

Id. at 371.

374. *See supra* note 245 and accompanying text.

375. *See supra* Part IV.

376. Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 238 (R.I. 1872).

377. Burnett v. Surratt, 67 S.W.2d 1041, 1041 (Tex. Civ. App. 1934).

378. *See supra* notes 1–4 and accompanying text.

379. *See supra* notes 67–71 and accompanying text.

380. *See* Arthur v. Milstein, 949 So. 2d 1163 (Fla. Dist. Ct. App. 2007).

381. *Id.* at 1166.

382. *Id.*

people, not abstractions."[383] These individuals are more than spouses, children, parents, and siblings. They have particular human needs, wishes, relationships, and circumstances. Mortal remains precedent should thus encourage reformers to look beyond the family paradigm for an inheritance scheme that considers decedents' entire "stories, in all their richness and detail."[384]

383. Baron, *supra* note 276, at 664.

384. *Id.* at 666.

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The (Not So) Puzzling Behavior of Angel Investors

Darian M. Ibrahim *61 Vand. L. Rev. 1405 (2008)*

Angel investors fund start-ups in their earliest stages, which creates a contracting environment rife with uncertainty, information asymmetry, and agency costs in the form of potential opportunism by entrepreneurs. Venture capitalists also encounter these problems in slightly later-stage funding, and use a combination of staged financing, preferred stock, board seats, negative covenants, and specific exit rights to respond to them. Curiously, however, traditional angel investment contracts employ none of these measures, which appears inconsistent with what financial contracting theory would predict. This Article explains this (not so) puzzling behavior on the part of angel investors, and also explains the recent move toward venture capital-like contracts as angel investing becomes more of a professional endeavor.

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